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No. 1651.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES NESBITT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

FILED OCTOBER 15, 1892.

(17,626.)

(17,025.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY, PLAINTIFF IN ERROR.

vs.

JAMES NESBITT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

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a In the Supreme Court of the State of Nevada.

JAMES NESBITT, Plaintiff and Respondent,
vs.
DE LAMAR'S NEVADA GOLD MINING COMPANY, Defendant and Appellant. } (No. 1529.)

Record on Appeal.

Geo. S. Sawyer, attorney for respondent.
Henry Rives and T. J. Osborne, attorneys for appellant.

Filed February 24, 1898.

EUGENE HOWELL,
Secretary of State and ex Officio Clerk.

1 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

The said plaintiff complains of said defendant and for cause of action alleges—

That said plaintiff is and at all the times mentioned in this complaint has been a citizen of the United States of America.

That said plaintiff is the owner of, as against all parties except the Government of the United States, an undivided three-eighths (3/8) of that certain mine, lead, lode, and mining claim situate in the Ferguson mining district, in said county of Lincoln and State of Nevada, and located, recorded, known, and called the "Fraction" mine and mining claim, and that he and his co-owners as tenants in common are now in possession and entitled to the possession of all of said mine and mining claim, and that he and his co-owners and his and their grantors and predecessors in interest have
2 been so the owners of, in the possession of, and entitled to the possession of said "Fraction" mine and mining claim under and pursuant to the laws of the Government of the United States since on or about the 15th day of May, A. D. 1892.

That said defendant unjustly and without right and adversely to said plaintiff and his cotenants as aforesaid claims to be the owner of and entitled to the possession of the ground embraced in said "Fraction" mine and mining claim.

That said defendant bases his pretended right to such possession upon the alleged location of a certain mining claim called by him the "Sleeper" mine and mining claim.

That said pretended location of the said "Sleeper" mine and mining claim was made subsequent to the location of said "Fraction" mine and mining claim and upon the identical ground embraced in said "Fraction" mine and mining claim.

That said defendant has applied for a patent to said "Sleeper"

mining claim at the United States land office at Carson City, Nevada, and that this plaintiff within the time allowed by the laws of the United States duly filed in said land office his protest against the issuance of such a patent by the Government of the United States to said defendant and his and his cotenants' adverse claim to that portion of said "Sleeper" mining claim embraced within said "Fraction" mining claim.

That through the said wrongful and unlawful acts of said defendant in making such wrongful and unlawful application for a patent to said "Sleeper" mining claim and thereby compelling this plaintiff to protest against and adverse the same in said land office and the courts the said plaintiff and his cotenants have been
3 damaged in a large sum, to wit, the sum of one thousand dollars.

Wherefore the said plaintiff brings this action and demands justice, and that the said court make a decree quieting the title of said plaintiff and his cotenants to said "Fraction" mine and mining claim, and that said defendant is not entitled to a United States patent to said "Sleeper" mine and mining claim, and that he have judgment against said defendant for the sum of one thousand dollars and all of his costs and disbursements incurred by him in making said protest and adverse claim and in this action.

GEO. S. SAWYER,
Attorney for Plaintiff.

STATE OF NEVADA, } ss:
County of Lincoln, }

James Nesbitt, being duly sworn, on oath says that he is the plaintiff in said above-entitled action, and that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon his information or belief, and that as to those matters he believes it to be true.

JAMES NESBITT.

Subscribed and sworn to before me this 26th day — January, A. D. 1897, at 5 o'clock p. m. of said date.

H. J. GOODRICH,
Clerk of said Court.

4 (Endorsed:) #1. No. 1397, original. Fourth jud. dist. court, State of Nevada, county of Lincoln. James Nesbitt *vs.* W. M. Davidson. Complaint. Filed this 26th day of January, A. D. 1897, at 5 o'clock p. m. of said date. H. J. Goodrich, clerk of said court. Geo. S. Sawyer, att'y for pl't'f.

5 *District Court Summons.*

In the Fourth Judicial District Court of the State of Nevada in and for Lincoln County.

The State of Nevada sends greeting to W. M. Davidson:

You are hereby required to appear in an action commenced against

you, as defendant, by James Nesbitt, as plaintiff, in the fourth judicial district court of the State of Nevada, Lincoln county, at the town of Pioche, and answer the complaint therein, which is on file with the clerk of said court, within ten days after the service on you of this summons (exclusive of the day of service), if served in said county, or twenty days if served out of said county, but within this district, and in all other cases forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover judgment against you, the said defendant, for the sum of one thousand dollars as damages for your assertion of a claim to the right of possession to the ground embraced in the "Fraction" mine and mining claim belonging to said plaintiff and his co-owners, and to obtain a decree of said court quieting the title of said plaintiff and his co-owners to said "Fraction" mine and mining claim, and decreeing that you have no right to the possession of or to have granted to you a United States patent to the "Sleeper" mine and mining claim, so called,
6 for which you have applied, as more fully appears by the complaint on file in the office of the clerk of said court.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to said court for the relief demanded in said complaint.

In testimony whereof I, H. J. Goodrich, have hereunto set my hand officially and affixed the seal of said court this 26th day of January, A. D. 1897, at 5 o'clock p. m. of said date.

H. J. GOODRICH,
County Clerk and ex Officio Clerk of the Fourth Judicial District Court of the State of Nevada, Lincoln County.

(Endorsed.)

1.

STATE OF NEVADA, }
County of Lincoln, } ss:

George Nesbitt, being duly sworn, on oath says that he is a citizen of the United States and over the age of twenty-one years.

That he served the within summons on William M. Davidson, the defendant named therein, at De Lamar, in said county of Lincoln, on the 2nd day of February, A. D. 1897, by then and there delivering to the said defendant personally a true copy of said
7 summons attached to a certified copy of the complaint in said action.

GEORGE NESBITT.

Subscribed and sworn to before me this 2nd day of February, A. D. 1897.

BENJ. SANDES,
[SEAL.] *Notary Public.*

(Endorsed:) # 2. No. 1397 (original). In the fourth judicial district court of the State of Nevada, Lincoln county. James Nes-

bitt, plaintiff, *vs.* W. M. Davidson, defendant. Summons. Geo. S. Sawyer, attorney for plaintiff. Filed on return this 5th day of February, A. D. 1897. H. J. Goodrich, clerk.

8 (Endorsed.)

3.

OFFICE OF THE SHERIFF,
STATE OF NEVADA, LINCOLN COUNTY.

I hereby certify that I received the within summons on the — day of ——, A. D. 189–, and personally served the same, on the — day of ——, on defendant within named, by delivering to —— ——, the said defendant, personally, in the county of —— and State aforesaid, a true copy of said summons attached to a certified copy of the complaint in said action.

——, A. D. 189–.

—— ——, *Sheriff*,
By —— ——, *Deputy*.

9 STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District Court, January Sitting, A. D. 1897, January 30th, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

Now comes Henry Rives, Esq., and enters the appearance of the defendant herein, and it is agreed by the attorneys for the respective parties that the defendant have to and including March 15th, A. D. 1897, in which to plead to the complaint herein.

A. E. CHENEY,
Dist. Judge.

H. J. GOODRICH,
Clerk of said Court.

STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District Court, May and June Sitting, A. D. 1897, May 26th, A. D. 1897.

JAMES NESBITT, Plaintiff, }
vs. } Demurrer.
WM. DAVIDSON, Defendant. }

9½ It was ordered that the demurrer is overruled. Defendant is allowed until 1 o'clock p. m., May 27th, in which to file his answer.

STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District Court, May-June Sitting, A. D. 1897, May 26th, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

Jury waived. It was ordered that the defendant have until May 28th, at 1 o'clock p. m., in which to file *their* answer. It was also ordered that F. X. Murphy, Esq., be added as associate counsel in the above-entitled case on the part of the plaintiff.

Approved:

G. F. TALBOT, *Judge.*

STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District Court, May-June Sitting, A. D. 1897, May 31st, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

This cause came on regularly for hearing on motion of plaintiff's counsel to strike out portions of plaintiff's complaint. Thereupon the court took the matter under advisement.

Approved:

G. F. TALBOT, *Judge.*

10 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff, }
vs.
W. M. DAVIDSON, Defendant. }

Now comes the defendant in the above-entitled action and demurs to the complaint of the plaintiff upon the ground that the same does not state facts sufficient to constitute a cause of action.

HENRY RIVES,
Att'y for Defendant.

(Endorsed:) # 1. In the district court, fourth judicial district, State of Nevada, in and for county of Lincoln. James Nesbitt, pl't'f, *vs.* W. M. Davidson, defendant. Demurrer. Filed March 15th, A. D. 1897. H. J. Goodrich. H. Rives, att'y for defendant.

11 In the Fourth Judicial District Court of the State of Nevada in and for Lincoln County.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

Now comes the above-named defendant and, answering to the complaint on file herein, denies that the plaintiff is the owner of, as against all parties except the Government of the United States, or otherwise or at all, of an undivided three-eighths (3/8) or any portion or at all of that certain vein, lead, or lode situated in the Ferguson mining district, Lincoln county, State of Nevada, and located, recorded, known, and called the "Fraction" mine and mining claim.

And denies that the plaintiff and his co-owners or any or either of them, as tenants in common or otherwise, are now in possession or entitled to the possession of all of said vein or mining claim or any portion thereof.

And denies that the plaintiff and his co-owners or either of them or his or their or either of his or their grantors or predecessors in interest have been, as alleged in the complaint or otherwise or at all, the owners of, in the possession of, or entitled to the possession of said "Fraction" vein or mining claim or any portion
12 thereof, under or pursuant to the laws of the Government of the United States or otherwise or at all, since on or about the 15th day of May, 1892, or since any other date or at all.

And denies that he unjustly or without right claims to be, as against the plaintiff and his cotenants, the owner of *are* entitled to the possession of the ground embraced in said "Fraction" vein and mining claim.

And he denies that his "Sleeper" vein and mining claim is upon the identical ground embraced in the "Fraction" mine and mining claim mentioned in the complaint, and he denies that there is or ever has been since the 1st day of January, 1895, any "Fraction" mine or mining claim.

And upon his information and belief he denies that within the time allowed by the laws of the United States or within or at any other time the plaintiff duly or otherwise filed in any United States land office his valid, legal, or regular protest against the issuance to the defendant of a patent by the Government of the United States, and likewise he denies that the plaintiff or his cotenants or either of them has ever filed in any land office his or their or either of their legal, valid, or regular adverse claim*ed* to any portion of the "Sleeper" mining claim.

And he denies that through any wrongful or unlawful or other act or acts of his in making any application for a patent to the "Sleeper" mining claim mentioned in the complaint the plaintiff or his cotenants or any or either of them have been damaged in a large sum, in the sum of one thousand dollars, or in any amount whatever.

13 And he denies that by or through any act or acts of his in applying for a patent to or for the "Sleeper" mine the plaintiff was compelled to protest against or adverse the same in any land office or any court, to the plaintiff and his cotenants' or to either of their damage in any sum whatever, and he denies they or either of them have been damaged in any sum whatever by any act or acts of the defendant.

And for a further and separate answer and defense to this action the defendant alleges:

That the plaintiff's and his co-owner George Nesbitt's only claim and title to the said "Fraction" mine is based upon and derived through and by virtue of pretended sales under executions issued upon two pretended judgments rendered by the justice's court in and for Pioche township, Lincoln county, State of Nevada, by one A. A. Young, justice of the peace of said township, in two certain actions or suits, in which said plaintiff and George Nesbitt were plaintiffs and in — of which suits or actions one H. Stephens was the defendant and in the other of said suits or actions one W. S. De Beque was the defendant.

That at said time the said Stephens and the said De Beque each claimed to be an owner of an undivided portion of said pretended mine or mining claim.

That about the — day of July, 1893, the said plaintiff and his co-owner George Nesbitt caused executions to be issued upon said two judgments, and thereunder they pretended and attempted to levy upon and sell the interests of the said Stephens and De Beque in said pretended mining claim.

14 That said pretended mining claim was situated in what was known as and called at that time the Helene or Ferguson township and beyond the limits of said Pioche township.

That said pretended levies and sales were made by one J. A. Denton, who was neither a qualified or acting sheriff of Lincoln county nor a qualified nor acting constable of any township in said Lincoln county, and he had not then nor has he ever had or been vested with any authority whatsoever to levy or make any sale under either of said executions, and upon his information or belief defendant alleges that no notice of any sale under either of said executions was ever given or posted in the manner required by law, and that said sales and all the subsequent acts of said Denton and especially the conveyance of the premises described in the complaint by him to the plaintiff and the said George Nesbitt were each and all of them illegal, null, void, and of no force and effect whatever.

And for a further answer and defense the defendant alleges that ever since the 1st day of January, 1895, he and his colocator of the "Sleeper" mining claim have been continuously and the defendant now is in the open, notorious, exclusive, and adverse possession, as against all the world except the Government of the United States, of said "Sleeper" mining claim and every part and portion thereof.

And for a further and separate defense defendant alleges that ever since the 1st day of January, 1895, he and his grantor have been and the defendant now is the owner of, as against all the world ex-

cept the Government of the United States, and in the possession of all that certain mine and mining claim which is situated in the Ferguson mining district, Lincoln county, State of Nevada, and which is known as and called the "Sleeper" mine or mining
15 claim and which is about one thousand feet in length by six hundred feet in width and adjoins the Lookout claim on the western side of said Lookout claim.

That said plaintiff, one George Nesbitt, and one A. Burth, unjustly and without right and adversely to the defendant, claim to be the owners of and entitled to the possession of some portion of the ground an- area embraced within the boundaries of said "Sleeper" mine and mining claim.

That said plaintiff and the said George Nesbitt and A. Burth based their rights to such possession upon the alleged pretended location called by them the "Fraction" mine and mining claim, and which said location is and always has been illegal, void, and null.

That by reason of said unjust and illegal assertion of right to the possession of said portion of said "Sleeper" mine by the plaintiff the defendant has been greatly damaged, to wit, in the sum of one thousand dollars, lawful money of the United States.

Wherefore the defendant prays a decree in his favor quieting his title to said "Sleeper" mine and mining claim, and that the plaintiff is not entitled to any portion thereof, and that he have judgment against the plaintiff for the sum of one thousand dollars, lawful money of the United States, and his costs of suit.

HENRY RIVES AND
F. R. McNAMEE,
Att'ys for Defendant.

16 STATE OF NEVADA, }
County of Lincoln, } *ss.:*

W. M. Davidson, being first duly sworn, deposes and says that he was the defendant in the above-entitled action; that he has read over the foregoing answer and knows the contents thereof: that the same is true of his own knowledge except as to those matters therein stated upon his information and belief, and as to those matters he believes it to be true.

W. M. DAVIDSON.

Subscribed and sworn to before me this 28th day of May, 1897.

F. R. McNAMEE,
Notary Public.

(Endorsed:) # 1. In the fourth judicial dist. court, State of Nevada, Lincoln county. James Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant. Answer. Filed May 28th, A. D. 1897. H. J. Goodrich, clerk of the district court. Henry Rives and F. R. McNamee, att'ys for defendant.

17 Fourth Judicial District Court of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

You will please take notice that on Saturday, the 31st day of May, A. D. 1897, at 10 o'clock a. m., or so soon thereafter as counsel can be heard, the said plaintiff, by his attorneys, will move said court to strike out from defendant's answer all of lines 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, on page 2 of said answer, on the ground that the same is irrelevant and is only a statement of conclusions of law.

GEO. S. SAWYER,
F. X. MURPHY, AND
BENJ. SANDERS,
Att'ys for Plaintiff.

Due service of the above notice is hereby admitted and time waived.

HENRY RIVES,
Att'y for Def't.

18 (Endorsed:) # 1. Orig. No., 1397. 4th jud. dist. court, State of Nevada, county of Lincoln. James Nesbitt *vs.* W. M. Davidson. Notice of motion to strike out portion of answer. Filed May 28th, A. D. 1897. H. J. Goodrich, Co. clerk.

STATE OF NEVADA,
County of Lincoln, } *ss:*

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing notice of motion to strike out portion of answer is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.]

H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

19 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

Now comes W. M. Davidson, the defendant in the above-entitled action, and by leave of court files this his amended answer, and alleges that since on or about the 27th day of May, 1897, he has

been and still is the owner of, in the possession of, and entitled to the possession of all of that certain mine and mining claim situated in Ferguson mining district, Lincoln county, State of Nevada, which is known as and called the Sleeper No. 2 lode and mining claim, which covers, includes, and embraces twelve hundred feet in length on and along said (Sleeper No. 2 Lode) mining claim and two hundred and seventy-five feet on each side of the center line thereof.

That said Sleeper Lode No. 2 mining claim covers, includes, and embraces besides other premises the area and ground known as and called the Fraction mine and mining claim and every part thereof, and upon his information and belief he alleges that his right and title to the premises described in the complaint under his said Sleeper No. 2 Lode mining claim location is the only valid title to said premises and is superior to any title thereto set up by the plaintiff.

20 Wherefore he prays he may have judgment quieting his title to said Sleeper No. 2 Lode mining claim, and for his costs of this suit.

HENRY RIVES AND
F. R. McNAMEE,
Attorneys for Defendant.

STATE OF NEVADA, }
County of Lincoln, } ss:

W. M. Davidson, being first duly sworn, deposes and says that he has read over the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters alleged therein upon information and belief, and as to those matters he believes it to be true.

W. M. DAVIDSON.

Subscribed and sworn to before me this 2nd day of June, 1897.
[SEAL.] F. R. McNAMEE,
Notary Public.

(Endorsed:) # 1. No. 1397. Plaintiff's exhibit marked No. 8. Filed June 3rd, 1897. H. J. Goodrich, clerk. This answer was read and referred to on the hearing of the motion for a new trial in said action. G. F. Talbot, J.

21 (Endorsed:) # 2. In the fourth judicial district court, State of Nevada, county of Lincoln. James Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant. Amended answer. Filed June 2nd, A. D. 1897. H. J. Goodrich, clerk.

STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing amended answer, filed as Plaintiff's Exhibit No. 8, is the original document

or paper introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th
22 & 23 day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

24 In the Fourth Judicial District Court, County of Lincoln, State of Nevada.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

STATE OF NEVADA,
County of Lincoln, } ss:

W. M. Davidson, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that the complaint in the said action was filed on the 28th day of January, A. D. 1897; that the answer of said defendant was filed in said action on the 28th day of May, A. D. 1897; that the trial of this case cannot be safely proceeded with at this May and June sitting, A. D. 1897, of this court on account of the absence of one James Murphy, who is a material and necessary witness on behalf of defendant in this case.

That the said James Murphy is now and for the past six months has been a resident of State Line, county of Iron, State of Utah.

That the defendant has used due diligence to procure the attendance of the said James Murphy at the coming trial of said cause, and on the 28th day of May, A. D. 1897, the defendant caused
25 a subpœna to be duly issued out of said court and placed in the hands of Wm. Perry, a citizen of the United States, for service.

That on or about the 25th day of April the said James Murphy had his leg broken and was severely cut on the head as the result of a premature blast in the prospect he was working at in aforesaid State Line mining district, State of Utah.

That on the 5th day of May, A. D. 1897, this defendant was informed by one Doctor Hammond, the physician who attended the said Murphy's wounds, that the said Murphy could not be conveyed to the town of Pioche by the 26th day of May, A. D. 1897.

That at the time that said subpœna was issued and placed in the hands of said Perry for service the said defendant caused the said Perry to procure a team and spring wagon, with mattresses and bedding, suitable for conveying a person in the said Murphy's condition to the town of Pioche, Lincoln county, Nevada.

And defendant on his information and belief states that the said Perry proceeded to State Line, Iron county, Utah, to convey the said Murphy to the town of Pioche, but that the said Murphy was in

such a condition that it was impossible to remove him from his cabin, having suffered a relapse within the past five days, and will not be able to leave his cabin for several weeks.

That defendant is informed and believes that the testimony of the said James Murphy in said case will be and that said Murphy if present would testify that on the first day of January, A. D.
26 1895, he located the Sleeper mining claim, situated in Ferguson mining district, Lincoln county, Nevada, by posting a notice at the point of discovery in a monument of stones, and marked the corners of the aforesaid Sleeper mining claim in the manner and way following:

By building monuments of stones at each of the four corners of the claims and marking the same by notices designating each of the aforesaid corners respectively as the northwest corner Sleeper claim, located Jan'y 1st, 1895; northeast corner Sleeper claim, located Jan'y 1st, 1895; southeast corner Sleeper claim, located Jan'y 1st, 1895, and southwest corner Sleeper claim, located Jan'y 1st, 1895.

That afterwards, to wit, on the same day, he caused a true copy of the location notice, posted, as aforesaid, upon the Sleeper mining claim, to be recorded in the office of the recorder of the Ferguson mining district, and afterwards, during the month of January, A. D. 1895, he caused the said notice of location to be recorded in the office of the recorder of Lincoln county, State of Nevada.

That on many occasions since he has pointed out and shown to this defendant the identical location point and monument of said Sleeper claim and the notice which he posted upon the same on January 1st, 1895.

That frequently since that date he has pointed out and shown to the defendant all monuments, together with the notices therein, denoting the boundaries of said Sleeper mining claim.

That from the first day of January, 1895, until the 15th of November, 1895, he, the said Murphy, was in the open, notorious,
27 peaceable, and adverse possession, as against all the world except the Government of the United States and the said defendant, of the said Sleeper mining claim, and during said time made valuable and extensive improvements, consisting of a tunnel 25 feet in length, a tunnel 30 feet in length, an open cut of 15 feet; also a tunnel 12 feet in length running from said cut, a tunnel 10 feet in length, and a tunnel 7 feet in length; also a place graded off to put up the blacksmith outfit, and built 100 yards of a trail to make the place easy of access.

That the defendant first learned that the attendance of the said James Murphy, absent witness, could not be obtained May 30th, A. D. 1897, and by reason of such knowledge the defendant was unable to procure his deposition.

That this application for continuance is made in good faith and not for delay merely, and that if continued the defendant will be able to procure the said James Murphy as a witness in said trial at the next sitting of this court, as affiant is informed and believes that within two months the said Murphy will have sufficiently re-

covered from his injuries to be present at the hearing of this case.

And that defendant knows of no other witness by whom the facts above stated can be proven in this case.

W. M. DAVIDSON.

Subscribed and sworn to before me this 31st day of May, A. D. 1897.

F. R. McNAMEE,
[SEAL.] *Notary Public.*

28 (Endorsed:) #1. Orig. No., 1397. Fourth judicial district court, State of Nevada, county of Lincoln. James Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant. Affidavit for continuance. Filed May 31st, A. D. 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. This affidavit was read and referred to on the hearing of the motion for a new trial. G. F. Talbot, J.

29 STATE OF NEVADA, }
County of Lincoln, } *ss:*

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing affidavit for continuance is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

30 STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District, May-June Sitting, A. D. 1897, June 1st, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

Affidavit for Continuance.

Now comes the defendant and asks for a continuance of the above case on the ground of an absent witness, James Murphy.

The plaintiff admits the witness would testify as claimed, and the motion was thereupon overruled.

Approved:

G. F. TALBOT, *Judge.*

STATE OF NEVADA,
County of Lincoln.

Fourth Judicial District, May-June Sitting, A. D. 1897, June 2nd, 1897.

JAMES NESBITT, Plaintiff,
vs.
WM. DAVIDSON, Defendant.

This case came on regularly for trial before the court sitting without a jury, Geo. S. Sawyer, Esq., and F. X. Murphy, Esq., appearing for the plaintiff; Henry Rives, Esq., and F. R. McNamee, Esq., appearing for the defendant.

31 Now comes the defendant and moves to file an amended answer. Motion to file amended answer is denied by the court. Thereupon the defendant excepts to the ruling of the court.

It was ordered, upon the motion of Geo. S. Sawyer, Esq., that Benjamin Sanders, Esq., be added as associate counsel on the part of the plaintiff.

A. Burth was called, sworn, and testified on the part of the plaintiff.

Now comes plaintiff and, by his attorney, introduces certified copy of the notice of location of the Fraction mine. Objected to by the defendant's counsel. Objection overruled by the court. Thereupon the plaintiff files notice of location, notice of Fraction mine, marked Plaintiff's Exhibit No. 1. Plaintiffs also file notice of intention to do assessment-work Nos. 2 and 3. Thereupon A. Burth was cross-examined by defendant's counsel.

Harry Lawry was called, sworn, and testified on part of the plaintiff, and was cross-examined by counsel for the defendant.

George Nesbitt was called, sworn, and testified on part of the plaintiff, and was cross-examined by counsel for the defendant.

Harry Lawry was called, sworn, and testified on part of the plaintiff, and cross-examined by counsel for the defendant.

Thereupon court took a recess until 1.30 o'clock p. m.

32 JAMES NESBITT, Plaintiff,
vs.
WM. DAVIDSON, Defendant.

This case was resumed. George Nesbitt was recalled and testified on the part of the plaintiff.

Herman Hartung called, sworn, and testified on the part of the plaintiff. Thereupon court took a recess until 7 o'clock p. m.

Court convened at 7 o'clock p. m.

JAMES NESBITT, Plaintiff,
vs.
WM. DAVIDSON, Defendant.

Now comes the plaintiff and, by his attorney, F. X. Murphy, Esq., moves that the name of A. Burth be added as one of the plaintiffs

in the above entitled case. Objected to by counsel for the defendant. The motion is overruled by the court.

Plaintiff offers deeds in evidence for the purpose of showing color and claim of title. Objected to by counsel for the defendant. Objection overruled by the court. Thereupon plaintiff files deeds, marked Plaintiff's Exhibit- Nos. 4, 5, 6, and 7.

A. Burth recalled and was examined by counsel for the defendant.

33 George Nesbitt was recalled and testified on the part of the plaintiff.

Approved:

G. F. TALBOT, *Judge.*

STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District, May-June Sitting, A. D. 1897, June 3rd, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

A. Marshall called, sworn, and testified on the part of the plaintiff and was cross-examined by counsel for the defendant.

Harry Lawry recalled by plaintiff's counsel and re-examined by counsel for the defendant.

Now comes plaintiff's counsel and files defendant's amended answer, marked Plaintiff's Exhibit No. 8. Thereupon, the plaintiff's evidence being all submitted, the plaintiff closes.

Now comes the defendant and by his counsel, Henry Rives, *and* makes a motion for nonsuit. Objected to by counsel for the plaintiff. Objection sustained, and motion for nonsuit is denied by the court. Defendant excepts to the ruling of the court.

Frank Wilson called, sworn, and testified on the part of the defendant and was cross-examined by counsel for the plaintiff; re-examined by counsel for the defendant.

34 W. J. Dooley called, sworn, and testified on the part of the defendant and was cross-examined by counsel for the plaintiff and re-examined by counsel for the defendant.

Frank Wilson recalled by counsel for the defendant.

Court adjourned until 1.30 o'clock p. m.

Court convened at 1.30 o'clock p. m.

JAMES NESBITT, Pl'ff, }
vs.
WM. DAVIDSON, Defendant. }

Case resumed. G. T. McGee was called, sworn, and testified on the part of the defendant.

Thomas Edwards called, sworn, and testified on the part of the defendant and was cross-examined by counsel for the plaintiff.

Defendant filed Exhibit "A," the organization of Ferguson mining district.

Russ Allen was called, sworn, and testified on the part of the defendant.

J. A. Denton was called, sworn, and testified on part of the defendant and was cross-examined by counsel for the plaintiff.

H. M. Cratsenberg was called, sworn, and testified on the part of the defendant and was cross-examined by counsel for the plaintiff.

Wm. Davidson was called, sworn, and testified on the part of the defendant. The defendant files mining notice of location of the Sleeper mine, marked Defendant's Exhibit "B."

35 Harry Lawry recalled in rebuttal by counsel for the plaintiff. H. M. Cratsenberg recalled in rebuttal by plaintiff's counsel. A. Burth recalled in rebuttal by counsel for the plaintiff.

The testimony all being submitted on the part of the plaintiff, plaintiff rests.

Defendant files map of Sleeper mine, marked Defendant's Exhibit "C."

Court adjourned until 7 o'clock p. m.

Court convened at 7 o'clock p. m.

J. NESBITT, Plaintiff,
vs.
WM. DAVIDSON, Defendant.

This case resumed. The evidence all being submitted on the part of plaintiff and defendant, Benjamin Sanders, Esq., proceeded to address the court on part of the plaintiff. F. R. McNamee proceeded to argue the case on part of the defendant, and was followed by F. X. Murphy, Esq., for the plaintiff. Henry Rives, Esq., proceeded to address the court on part of the defendant, Geo. S. Sawyer, Esq., closing the argument on the part of the plaintiff.

The court took the matter under advisement.

Approved:

G. F. TALBOT, *Judge.*

36 STATE OF NEVADA,
County of Lincoln.

Fourth Judicial District Court, May-June Sitting, A. D. 1897, June 5th, A. D. 1897.

JAMES NESBITT, Plaintiff,
vs.
WM. DAVIDSON, Defendant.

Judgment by the Court.

It is ordered by the court that judgment be entered in favor of the plaintiff and against the defendant for the recovery of the premises in dispute and costs of suit, including plaintiff's expenses of the survey and filing protest. The plaintiff's counsel are requested to draw a form of judgment.

On motion of Henry Rives, Esq., counsel for the defendant, it is ordered that the defendant be allowed forty days in which to file and serve notice of motion and statement on motion for new trial. By consent of parties, execution be stayed for forty days. It is ordered that the bond to stay execution in the above case be filed in the sum of five hundred dollars, said bond to be approved by the judge of the said district court.

At this time comes Henry Rives, counsel for the defendant, and asks the court to make and render its decision in the above case in writing, and to file findings of fact and conclusions of law.

Approved:

G. F. TALBOT, *Judge.*

37 STATE OF NEVADA, }
County of Lincoln. }

Fourth Judicial District Court, October-November Sitting, A. D. 1897, November 9th, 1897.

JAMES NESBITT, Plaintiff, }
vs.
WM. DAVIDSON, Defendant. }

Motion for New Trial.

This case came up on motion for new trial; Geo. S. Sawyer, Esq., and F. X. Murphy, Esq., attorneys for the plaintiff, and Henry Rives, Esq., and T. J. Osborne, Esq., attorneys for the defendant.

It was ordered that "De Lamar's Nevada Gold Mining Company" be substituted as defendant in the above-entitled case in the place of Wm. Davidson, deceased.

The above case was duly argued before the court by the attorneys for the respective *counsel.* Thereafter the court took the matter under advisement.

Court adjourned until 1.30 o'clock p. m.

Court convened at 1.30 o'clock p. m.

JAMES NESBITT, Plaintiff, }
vs.
DE LAMAR'S NEVADA GOLD MINING COMPANY, Defendant. }

It was ordered by the court that each party shall have ten days in which to appeal from the order deciding the motion for new trial after receiving written notice of the filing of such order.

Approved:

G. F. TALBOT, *Judge.*

38 STATE OF NEVADA, }
County of Lincoln, } *ss:*

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court in and for said county of Lincoln and State of Nevada, do hereby certify that the foregoing is a full, true, and correct copy of the original minutes of said court in the case of

James Nesbitt *vs.* Wm. Davidson, in which De Lamar's Nevada Gold Mining Company was substituted as defendant on November 9th, 1897, in place of Wm. Davidson, deceased, said minutes constituting part of the transcript on appeal in said case now on file in my office.

Witness my hand and the seal of said court aforesaid this third day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
Clerk of the Fourth Judicial District Court,
Lincoln County, Nevada.

39 In the Fourth Judicial Dist. Court, State of Nevada, Lincoln County.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

Now comes the defendant and moves the court to grant a nonsuit in this action and dismiss the same upon the ground that the court has already declared on this trial that the certificates of sale and deeds introduced by plaintiff are absolutely void, because they were founded upon a judgment which has likewise on this trial been declared by this court to be void.

Second. Because the plaintiff and his pretended co-owners have shown no manner or character of actual possession of the Fraction mine during either of the years 1893 or 1894.

Third. And because the complaint in this action shows that the defendant is in good faith shown to be the owner and to have claimed the possession of the Sleeper mining claim, and that said Sleeper mining claim is identical and embraces the said Fraction mining claim, and in the testimony already introduced it is shown that the defendant and one Murphy located and occupied said Sleeper mining claim on the 1st day of January, 1895, and such fact has been admitted and assumed to be true by the conduct of counsel in this case during the trial and prior to this motion.

40 Fourth. Because it appears from the testimony in the case and from the complaint that the defendant and said Murphy worked upon and developed the said Sleeper mining claim during the years of 1895 and 1896 and during said years at times occupied and performed various acts of ownership thereon without let or hindrance from the plaintiffs, without his permission or that of any of his pretended co-owners, and openly, notoriously, and adversely during said time.

Fifth. And because the plaintiff has utterly failed to show in himself during any two years prior to the commencement of this action any open, notorious, adverse, or exclusive and continuous possession of the Fraction mine or any portion thereof so as to establish any prescriptive right to the same.

HENRY RIVES AND
F. R. McNAMEE,
Att'ys for Defendant.

(Endorsed:) #1. No. 1397, original. 4th judicial dist. court, State of Nevada, Lincoln county. James Nesbitt *vs.* W. M. Davidson. Motion for nonsuit. Filed June 3rd, 1897. H. J. Goodrich, clerk.

41 STATE OF NEVADA, } *ss:*
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing motion for nonsuit is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* Wm. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

42 STATE OF NEVADA, } *ss:*
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court in and for said county of Lincoln and State of Nevada, do hereby certify that the annexed and foregoing papers are the original papers filed and used in the case of James Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant, in said fourth judicial district court, in which case, on the 9th day of November, A. D. 1897, De Lamar's Nevada Gold Mining Company was substituted in the place of Wm. Davidson as defendant, then deceased, and that said original papers consist of the complaint, summons, answer, demurrer, judgment, and decree, notice of motion for new trial, undertaking on motion for new trial, stipulating extending time to file and serve statement on motion for new trial, order extending time to file and serve statement on motion for new trial, engrossed statement on motion for new trial, order overruling motion for new trial, notice of appeal, undertaking on appeal, notice of motion to strike out portion of answer, affidavit for continuance, amended answer, filed as Plaintiff's Exhibit No. 8; certificate of sale from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 7; deed from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 6; certificate of sale from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 5; deed from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 4; certified copy of notice in lieu of assessment-work for 1893, filed as Plaintiff's Exhibit No. 3; certified copy of notice in lieu of assessment-work for 1894, filed as Plaintiff's Exhibit No. 2; certified copy of notice of location of
43 Fraction mine, filed as Plaintiff's Exhibit No. 1; notice of location of Sleeper mine, filed as Defendant's Exhibit "B."

Also the original complaint, summons, affidavit for publication of summons, order for publication of summons, and affidavit of publication of summons in the case of J. Nesbitt & Bro. *vs.* De Beque,

in the justice's court of Pioche township, introduced in evidence on the trial of the above-entitled case and used and referred to on the motion for a new trial of said case; also the original complaint, summons, affidavit for publication of summons, order for publication of summons, and affidavit of publication of summons in the case of J. Nesbitt & Bro. *vs.* H. Stevens, in the justice's court of Pioche township, introduced in evidence on the trial of the above-entitled case of James Nesbitt *vs.* De Lamar's Nevada Gold Mining Company, and used and referred to on the motion for a new trial of said case.

And I also certify that the foregoing minutes of court relating to the trial, etc., of said case of Nesbitt *vs.* De Lamar's Nevada Gold Mining Company are true and correct copies of the orders of said district court relating to said cause, and that the foregoing enumerated papers and minutes of court constitute in part the record on appeal of said case of James Nesbitt *vs.* De Lamar's Nevada Gold Mining Company, from said fourth judicial district court to the supreme court of the State of Nevada.

Witness my hand and the seal of said fourth judicial district court aforesaid this third day of February, A. D. 1898.

H. J. GOODRICH,

[SEAL.] *Clerk of the Fourth Judicial District Court, Lincoln County, Nevada.*

44 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

Judgment and Decree.

This cause came on regularly for trial on the 2nd day of June, A. D. 1897, Geo. S. Sawyer, F. X. Murphy, and Benj. Sanders, Esqrs., appearing as counsel for plaintiff, and Henry Rives and F. R. McNamee, Esqrs., for the defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried by the court sitting without a jury.

Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and documentary evidence introduced; the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court orders that a judgment and decree be entered herein in favor of said plaintiff and against said defendant.

Wherefore it is ordered, adjudged, and decreed that the said plaintiff, James Nesbitt, and his cotenants are the owners of all that certain mine and mining claim situate in the Ferguson mining district,
in the county of Lincoln, State of Nevada, located, known,
45 and called the "Fraction" mine and mining claim, as the same is described in the complaint in this action, as against all parties except the Government of the United States, and that

their title thereto be quieted, and that said defendant is not entitled to a United States patent to that portion of the "Sleeper" mining claim embraced within the boundary lines of said "Fraction" mine and mining claim.

And it is further ordered, adjudged, and decreed that said plaintiff do have and recover of and from said defendant all his costs and disbursements in this action, including the sums of one hundred and twenty dollars for expense of having said claim surveyed and ten dollars as fees paid to the officers of the United States land office at Carson City, Nevada, for the filing of his adverse claim to said defendant's application for a patent to said "Sleeper" mining claim, all of said costs and disbursements being taxed at $256.00, which amount includes said expense of survey and land-office fees.

Done in open court this 5th day of June, A. D. 1897.

G. F. TALBOT, *Judge.*

Judgment and decree recorded this 7th day of June, A. D. 1897.

[SEAL.] H. J. GOODRICH,
Clerk of said Court.

(Endorsed:) #1. No. 1397, original. District court, fourth
46 jud. dist., State of Nevada, county of Lincoln. James Nesbitt *vs.* W. M. Davidson. Judgment and decree. Filed June 5th, A. D. 1897. H. J. Goodrich, clerk.

(Endorsed.)

#2.

In the District Court of the Sixth Judicial District of the State of Nevada in and for Lincoln County.

JAMES NESBITT, Plaintiff,
against
W. M. DAVIDSON, Defendant.

I, the undersigned, county clerk of the county of Lincoln, State of Nevada, and *ex officio* clerk of the district court of the fourth judicial district of said State in and for Lincoln county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book B of said court, at page- 247 & 248; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

[SEAL.] Witness my hand and the seal of the district court this seventh day of June, A. D. 1897.

H. J. GOODRICH, *Clerk.*

47 (Endorsed:) #3. No. 1397; 906. District court of sixth judicial district, county of Lincoln. James Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant. Judgment-roll. Filed June 5th, 1897. H. J. Goodrich, clerk. —— ——, deputy clerk. Judgment Record, page- 247 & 248.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing complaint, summons, demurrer, answer, and judgment and decree constitute the judgment-roll in said action, and that they are severally the original documents or papers used on the trial of the case entitled Nesbitt *vs.* Wm. Davidson, in said court, and the same were referred to on the hearing of the motion for a new trial in
48 said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

In the District Court, Fourth Judicial District of the State of Nevada, in and for Lincoln County.

JAMES NESBITT, Plaintiff,
vs.
WM. M. DAVIDSON, Defendant.

To George S. Sawyer, Frank X. Murphy, and B. Sanders, attorneys for plaintiff:

Please take notice that Wm. M. Davidson, the defendant in the above-entitled action, on Monday, the 6th day of September, 1897, at the court-room of the above-named court, in the town of
49 Pioche, in Lincoln county and State of Nevada, at 10 o'clock a. m. on said day, or as soon as counsel can be heard, will move said court for a new trial in said cause and to set aside and vacate the judgment which was rendered in said cause on the 5th day of June, 1897.

Said motion will be based upon a statement to be hereafter filed, and such portions of the record in said cause and documents on file therein as may be read or referred to on the hearing of the motion.

The motion will be made upon the following statutory grounds:

First. Insufficiency of the evidence to justify or sustain the judgment aforesaid, and because the same is against and contrary to law.

Second. Errors in law which occurred on the trial and which were excepted to by the defendant, and which are and will be more particularly set forth and specified in the aforesaid statement.

HENRY RIVES AND
T. J. OSBORNE,
Att'ys for Defendant.

(Endorsed:) #1. No. 1397, original. District court, 4th district Lincoln county, Nevada. James Nesbitt *vs.* Wm. M. Davidson
50 Notice of motion for a new trial. Filed July 26th, 1897, at 20 minutes past 9 o'clock a. m. H. J. Goodrich, county

clerk. Due service of a copy of the within, after it had been filed with the county clerk, is hereby admitted this 26th of July, 1897. Geo. S. Sawyer, att'y for plaintiff.

(Endorsed:) # 2. The within notice was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing notice of motion for a new trial is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

51 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff, }
vs.
W. M. DAVIDSON, D'f't. }

It is hereby stipulated that the defendant in the above-entitled action shall have to and including the fifth day of August, A. D. 1897, in which to file and serve notice and statement on motion for a new trial of said action.

GEO. S. SAWYER,
F. X. MURPHY, AND
BENJ. SANDERS,
Attorneys for the Plaintiff.

Dated July 3rd, 1897.

(Endorsed:) # 1. No. 1397. District court, 4th judicial dist., State of Nevada, Lincoln county. James Nesbitt *vs.* W. M. Davidson. Stipulation extending time to file and serve notice and
52 statement. Filed July 3rd, 1897. H. J. Goodrich, clerk.

(Endorsed:) # 2. The within stipulation extending time was read and referred to on the hearing of motion for a new trial of said case. G. F. Talbot.

STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing stipu-

lation extending time to file and serve statement and notice of motion for new trial is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

53 In the District Court, Fourth Judicial District of the State of Nevada, in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

In the above-entitled action, good cause appearing therefor, it is hereby ordered that the time allowed defendant in which to serve and file his "notice" of motion for new trial and his statement on motion for new trial and appeal be extended for a period of twenty days.

G. F. TALBOT,
District Judge.

Dated July 1st, 1897.

(Endorsed:) # 1. No. 1397. Jas. Nesbitt *vs.* Wm. M. Davidson. Order extending time. Filed July 6th, 1897. H. J. Goodrich, clerk. This order was read and referred to on the hearing
54 of the motion for a new trial of said case. G. F. Talbot, J.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing order extending time to file and serve statement on motion for new trial is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the otion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

55 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
W. M. DAVIDSON, Defendant.

Engrossed Statement.

This cause came on regularly for trial before the court, sitting

without a jury, a jury having been expressly waived by a consent of the parties in open court, the Hon. Geo. F. Talbot, district judge, presiding.

Geo. S. Sawyer and F. X. Murphy, Esqs., appeared as counsel for plaintiff, and Henry Rives and F. R. McNamee as counsel for defendant.

The defendant moved for a continuance and postponement of the trial on account of the absence of a material witness named James Murphy. The plaintiff's counsel admitted that if the witness were present he would testify as stated in the affidavit introduced in the motion for postponement.

Thereupon the court overruled the motion for a postponement, and the defendant excepted.

Thereupon the defendant moved the court for leave to
56 file an amended answer; which answer is verified on the 2nd day of June, 1897, and filed herein on the same day.

The court refused to admit the amended answer to be considered and directed the trial to proceed upon the original complaint and answer and defendant excepted.

To maintain the issues on his part, the plaintiff called AUGUST BERTH, who, being duly sworn, testified:

I know the Ferguson mining district. I have resided there about five years. I am an American citizen, and have been a citizen of the United States for eight or ten years.

I know the "Fraction" mine; have known it since 1892. I located that ground on the 15th day of May of that year.

Upon mineral-bearing rock in place. I built a monument of rock about 2½ or 3 feet high at the discovery point, and I also on that day erected a monument of a similar character at each corner of the claim. Myself and my partners at that time placed a notice of location on the discovery monument and had it recorded.

Here plaintiff's counsel offered in evidence what purported to be a certified copy of the notice of location of the "Fraction" mine.

The defendant objected to the introduction of the copy on the ground that it is not the best evidence, and that it is incompetent, and the loss of the original has not been accounted for, and upon the further ground that the notice is indefinite and uncertain and does not refer to any permanent monument or well-known natural object in the district.

57 By the COURT: Let the plaintiff give testimony as to the loss of the original.

By Mr. SAWYER: Mr. Berth, what did you do with the original notice?

A. I put it in the monument.

Q. Did you have a duplicate copy of it?

A. Yes, sir. My partner, Stevens, took it along with him when he left here. When he went away he took the copy with him.

Q. Where is Stevens now?

A. I don't know, sir.

Q. Well, have you been able to find the original?
A. No, sir.
Q. Have you looked for it?
A. Yes, sir.
Q. You stated that this is a copy of the one you put in the monument.
A. Yes, sir; it is.
Q. Have you looked in the monument to see whether the original is in there or not?
A. Yes, sir; I have looked lots of times and the notice is not there.
Q. Do you know where it is?
A. No, sir.

Mr. SAWYER: May it please the court, I offer this copy, because the original cannot be found; it is lost.

Mr. RIVES: Mr. Berth, when did you give that duplicate copy to Mr. Stevens?
A. I gave it to him in May, sir, 1892.
Q. What time in May—can you tell what day?
A. No, sir; I can't.
58 Q. You posted the notice on the claim; who wrote the notice, did you?
A. No, sir; Mr. Ellis wrote it, sir. He wrote it and I posted it; we both went over there together. Mr. Ellis showed me where the ground was; he showed me where to put the stakes.
Q. After this you gave a copy of it for record?
A. Yes, sir.
Q. Who made the copy?
A. Well, sir, I went to Stevens and told him what I had done, and he went and got some paper and helped me to put up the corners, and De Beque was there also, and he made the copy. Wm. De Beque made the copy.
Q. When was the last time you saw the location monument of the Fraction?
A. I have been there several times. I was there a few days ago. I was there on the 29th of May last. Before that I have been there a hundred times since 1892.
Q. When did you first discover that the notice was gone?
A. I first missed it in 1893.
Q. Did you look around there to see if you could find it?
A. Yes, sir; I did.
Q. Where did you look?
A. I looked all around the location monument.
Q. Did you look in the monument?
A. Yes, sir; I did. I looked in among the rocks.
Q. How wide is that monument?

Mr. SAWYER: I object to the question.
The court sustained the objection. Defendant excepts.

59 Q. How far could you see into that monument?

A. Well, some places I could see right through it. I could see into it seven or eight inches.

Q. You could see clean through it in some places and in others you could see in seven or eight inches?

A. Yes, sir.

Q. Don't you think it might have been in there and you not have seen it?

A. No, sir. I looked for it several times. I hunted all around and could not find it.

Mr. SAWYER: You went to this monument several times for the purpose of examining it to see if you could find the notice?

A. Yes, sir; and I could not find it.

Mr. SAWYER: If the court please, I offer this copy. This is a certified copy of the original which was placed on record.

The COURT: Well, the original document is the best evidence. It seems that it has been gone since some time in 1893. I think there has been sufficient showing to prove that it is lost, and this certified copy has been shown to be a copy of the same one. Let it be admitted.

The counsel for the defendant took an exception.

The court then admitted the notice in evidence and it is marked Plaintiff's Exhibit "1."

The defendant then excepted to the order of the court admitting the certified copy of the notice of location.

60 The witness then testified:

Ellis, one of the owners of the Monitor mine, was with me when I located the Fraction and told me to locate the latter claim that he owned in the Monitor and Lookout.

He pointed out to me the boundary monuments of those claims and showed me the vacant ground between, which I located as the "Fraction." The "Monitor" joins the "Fraction" on the west and the "Lookout" on the east.

In July, 1892, I sunk a shaft on the Fraction mine; there was no more work done on the Fraction mine from that date until 1895, in December or in the fall. In 1895 there was $100 worth of work done. We ran a tunnel and made cuts in 1895, and the reasonable value of the same was a hundred dollars or more. In 1896 we sunk a shaft on the Fraction mine 12 feet deep, and the value of the work that year was one hundred dollars or more. This year, 1897, and since this suit was commenced, we have sunk a shaft on the mine at least a hundred feet.

I know the Sleeper mining claim. I know that it conflicts with the Fraction mine and covers about the same ground as the Fraction. Our discovery monument was about 300 feet from the Monitor and 200 feet from the Lookout mine.

My first work in 1892 upon the claim was done about 20 feet north of the discovery monument. In the fall of 1895 I had a man do some work in the tunnel which Jim Murphy had made upon that ground prior to that date, in 1895.

Other men did work at other places beside Murphy's tunnel.

I paid for my part of 27 days' work of one man in October,
61 1895. Mr. Marshall worked there for us in 1895; Jim Scully also worked there for us in 1895; they worked in October, 1895.

Here witness described several pieces of work in the shape of cuts and blasting out a bluff of ledge matter and said that the work — was done by Scully, Marshall, and the other man in 1895 was certainly worth more than $100.

The ledge in the Fraction mine runs east and west. In September and October, 1896, I worked 27 days on the claim and Mr. Rysen worked for the owners of the Fraction mine six or seven days.

Jacobson and Dwyer located a portion of the Fraction mine in 1896, under the name of the "Not Much," and did some work within the boundaries of the Fraction.

Witness was then asked the following questions:

Q. Did you not state several times in De Lamar, in April, 1895, that you had abandoned all your interest in the Fraction claim, and that Davidson and Murphy were welcome to it?

Plaintiff objected to the question as not being cross-examination. The court sustained the objection, and defendant excepted.

HARRY LAWRY was then called and sworn and testified as follows on behalf of plaintiff:

I have lived in the Ferguson mining district since 1892. I know the Fraction mine; first knew it some time during the summer of 1892. I was there about ten days after its location. I saw the discovery monument and all of the corners. I saw the
62 notice of the location in the discovery monument, but I did not read it. I examined the southeast corner particularly; it was indicated by a monument about three feet high. I visited the claim in June, 1892; prospected to find a place for a location. I have since examined all of the corners of the Fraction mine, and the monuments were similar to others in the district. I could easily trace the boundaries. The "Lookout" claim lies east of the Fraction and the "Monitor" lies west of it. I know the "Sleeper" mining claim of Mr. Davidson; it runs north and south and covers the Fraction; the location notice of the "Sleeper" was put in the discovery monument of the "Fraction."

GEORGE NESBITT, sworn on behalf of plaintiff, testified:

I reside in De Lamar, Ferguson district, Nevada. I resided there two years. I have known this Fraction claim since 1892. I first became interested in this claim in 1893. I became interested through a judgment and sale under execution against Stephens and De Beque, two of the original locators of the Fraction mine.

I obtained a judgment against them for goods and merchandise which were sold them and I have exercised acts of ownership over

that claim since about the middle of August, 1893, when it was sold by special constable.

I did labor upon that claim in 1893 and 1894 as required by law. I don't mean that I did labor on it, but I mean that I filed the notice claiming an exemption from labor for the years 1893 and 1894.

Here the plaintiff offered in evidence what he called an exemption-of-work notice, "with the endorsements thereon," which
63 is dated the 26th day of December, 1893, and which purports to have been recorded by the county recorder on the 27th day of December, 1893.

Defendant objected to the introduction of the notice upon the ground that it is not signed by all the claimants or locators of the Fraction ground and because it is uncertain, ambiguous, and unintelligible.

The court overruled the objection and the defendant excepted.

The notice was then introduced in evidence and marked Plaintiff's Exhibit "3."

The plaintiff then offered in evidence what he also termed an "exemption notice," "with the endorsements thereon, for the year 1894."

Defendant objected to the introduction of the notice upon the ground that the same is ambiguous, uncertain, and unintelligible and does not refer to or embrace or include the Fraction mine, and that it is not signed by any owner or legal claimant of the Fraction mine.

Said notice is dated the 22nd day of December, 1894, and purports to have been recorded on the 27th day of December, 1894.

The court overruled the objection, the defendant excepted, and the notice was filed and marked Plaintiff's Exhibit # 2.

Witness continued:

I was on the claim frequently in 1895. Marshall, Jenkins, and Scully worked on the claim for us in 1895.

Was on the claim as much as ten times in December, 1895.
64 They all worked on the claim during the month of December, 1895.

They did no work there prior to the month.

Marshall worked 17, Scully worked 5, and Jenkins worked 6 days. I did some work around there myself sometimes when I went up to see how they were working. I was merchandising in De Lamar at that time and took tools and mining materials up to the mine for the men who were working. On my visits I did a little scratching around there myself, but not as a miner. The work done by Marshall and others was running some open cuts, besides they did some work in a tunnel which had been previously made there by Murphy. Their work was more like quarry-work than anything else. We did not sink a shaft.

It is easy to say what I paid for the work. I also furnished powder and fuse to the men. Neither the plaintiff nor myself caused

any work to be done on the Fraction mine in 1893 or 1894. The first work we caused to be done on the claim was done in December, 1895. Gus Burth did no work there, to my knowledge, in 1895 nor 1893 or 1894, but he paid us for his portion of the work which was done by Marshall, Scully, and Jenkins in 1895. I worked, I should say, four or five days, if it was all counted. I paid out for work one hundred dollars, and I considered I got value for it, for they blasted off some high bluff, and they run a cut twenty-six feet in length and from eight to ten feet deep, and then they sunk a hole or shaft five or six feet deep and run the tunnel five feet in. I considered all the work done was good improvement work. It was done under my instructions and I considered it was worth one hundred dollars. The material which I delivered on the ground for doing the work in 1895 would amount to about $25.00. In
65 1896, I think, the material furnished was about $20.00.

I cannot say exactly what damage has been done the plaintiff and myself by the defendant making application for a patent to what he calls the "Sleeper" mine.

We have had to file a protest in the Land Office and we have been compelled to make a survey, which cost us altogether, I think, about $140.00, besides we paid two or three helpers three or four dollars each for a couple of days in making the adverse survey.

I think we paid the surveyor, and for filing the protest in Carson, about $140.00. Besides these expenses I have been damaged by being taken away from my business a great deal in attending to this matter, and my time is worth $10.00 a day while away from my business.

The expenses of myself and others assisting me about this protest and adverse claim and this suit will amount to $20.00 per day.

In 1896, in order to do the work which we did there that year, we were compelled to use timbers, which added to the expense of the work for that year.

HERMANN HARTUNG was then called, sworn, and testified for the plaintiff:

I am justice of the peace of Pioche township, in Lincoln county, Nevada; I have been justice of the peace for three years. My predecessor, as justice of the peace, was named A. A. Young. As his successor I have possession of all of his records as justice of the peace.

66 Here the plaintiff offered in evidence all of the papers on file and the judgment rendered in the justice court in the case of J. Nesbitt & Bro. against H. Stevens, and also all of the papers on file and the judgment rendered in the case of J. Nesbitt & Bro. against William De Beque, in the same justice's court.

The defendant objected to the introduction of the said papers upon the ground that it does not appear that the justice of the peace acquired jurisdiction at the time he issued the summonses to make the same returnable 59 days after its date, because the affidavit filed for the purpose of obtaining the order of publication of the

summons is insufficient to authorize the justice of the peace to make an order for the publication, in that it does not state the last known place of residence of the defendant or his then place of residence, if known, and because it does not state that his place of residence is not known, and in that the order fails to direct the copy of the summons to be deposited in the post-office, directed to defendants in either case at their then place of residence, and in that the affidavit fails to show that any diligence has been exercised to serve the defendants personally or to ascertain their place of residence or post-office address, and because the justice of the peace made the summonses returnable for more than ten days after their date, and had them issued on the 12th day of May, 1893, and made returnable on the 10th day of July following, and the affidavits to authorize a longer period than ten days for the return of the summonses had not been filed and were not filed until the next day, and because the judgments are void in that the justice of the peace does not find as a fact nor recite in his docket in either of the
67 cases that due and legal service by publication or any service by publication had been made upon either Stevens or De Beque, and on the ground that in the case against De Beque the execution appears to have been issued for $10.00 more than the amount for which the judgment was rendered, and because the judgment in the case of Stevens is excessive and beyond the jurisdiction of the justice of the peace, in that it is entered for interest at the rate of 10 % per annum from the time of the filing of the complaint, contrary to law.

Defendant further objects to the judgments, summonses, and all of the proceedings in each of the cases in the justice's court subsequent to the filing of the complaint, in that it appears that all of the proceedings were null and void on account of the aforesaid insufficiency of affidavits filed to obtain an order for publication of the summonses.

The court sustained the objection of the defendant upon the ground that the affidavit for the publication of summons was insufficient, and the judgments, summonses, affidavits for publication, affidavit for attachment, the writs of attachment, and the returns upon the same and all of the proceedings in the cases from the date of the summons and the execution and the return thereon and the order directing the publication of the summons were excluded from the evidence; to which ruling the plaintiff excepted.

The plaintiff then offered in evidence two certificates of sale of several mines, including the "Fraction" mine, said certificates purporting to have been executed by one J. A. Denton under a purported deputation from the justice of the peace, A. A.
68 Young, for the purpose of making a sale and otherwise executing and carrying out the requirements of each of the executions in each of the cases.

The plaintiff in this action stated that he merely offered these certificates to show "a color of title," and that the plaintiff had since that date held the "Fraction" mine adversely to all the world.

The defendant objected to the introduction of each of the certificates upon the ground that they are irrelevant, immaterial, and incompetent for any purpose, and that the certificates of the sales made under execution by even a regularly authorized officer gave no right of possession or right of entry on or into the premises described in them and in no way constitute a "color of title" and do not confer any right of possession or entry. They cannot tend in the slightest degree to establish an adverse or any other kind of possession; and because the plaintiff in this action is not pleading any title arising from adverse possession, and because they are founded upon a judgment which this court has just excluded from evidence and held to be absolutely void, and because the justice of the peace who rendered the judgment acquired no jurisdiction to render *them*, no service of summons by publication or otherwise having been established, and therefore the certificates were invalid and void.

The court overruled the objections and admitted the certificates and directed that they be considered in the case, as tending to establish and to show "a color of title" and adverse possession and for no other purpose.

The defendant excepted to this ruling.

69 These certificates of sale are in the words and figures following:

In the Justice Court of Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of J. Nesbitt & Bro., Plaintiffs, *vs.* W. L. DE BEQUE, Defendant.	Certificates of Sale of Real Estate on Execution.

I, J. A. Denton, specially deputized by A. A. Young, justice of the peace of Pioche township, county of Lincoln, do hereby certify that by virtue of an execution in the above cause, tested the 15th day of July, 1893, by which I was commanded to make the amount of two hundred and twelve and $\frac{14}{100}$ dollars ($212.14), legal money of the United States, to satisfy the judgment in this action, with interest thereon and costs, out of the personal property of the above W. L. De Beque, defendant, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant on the 12th day of May, 1893, or at any time thereafter, as by the said writ, reference being thereunto had, more fully

70 appears, I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to said plaintiff-, "J. Nesbitt & Bro.," who were the highest bidders, for the sum of two hundred and twenty ($220) dollars, lawful money, which was the whole price paid by them for the same, the real estate described as follows, to wit:

An undivided $\frac{1}{8}$ of the "Jake" mine and mining claim.

An undivided ¼ of the "Broken Hatchet" mine and mining claim.

An undivided ½ of the "Fraction" mine and mining claim.

An undivided ⅛ of the "Zip Coon" mine and mining claim.

Interest in one cabin.

An undivided ¼ of the "Daisy" mine and mining claim.

An undivided ¼ of the "Double B" mine and mining claim.

An undivided ½ of the "North Star" mine and mining claim.

An undivided ½ of the "Sunset" mine and mining claim.

All situate in the Ferguson mining district, in said county of Lincoln and State of Nevada.

That the price of each distinct lot and parcel was as follows: "Jake," $25; "Broken Hatchet," $35; "Fraction," $30; "Zip Coon," $75; Cabin, $25; "Daisy," $5; "Double B," $5; "North Star," $10; "Sunset," $10.

And that the said real estate is subject to redemption in six months, pursuant to the statute in such cases made and provided.

71 Given under my hand this 11th day of August, 1893.

J. A. DENTON,
Special Deputy.

(Endorsements as follows:) J. A. Denton, special deputy, Pioche township, county of Lincoln, to J. Nesbitt & Bro. Certificate of sale of real estate on execution. Dated August 11th, 1893. Filed in the office of the county recorder of the county of Lincoln, State of Nevada, this 18th day of August, 1893. H. W. Turner, county recorder, by Alex. I. Harrison, deputy.

In the Justice Court of Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of "J. Nesbitt & Bro.," Plaintiffs, *vs.* H. STEVENS, Defendant.	Certificate of Sale of Real Estate on Execution.

72 I, J. A. Denton, specially deputized by A. A. Young, justice of the peace of Pioche township, county of Lincoln, do hereby certify that by virtue of an execution in the above cause, tested the 15th day of July, 1893, by which I was commanded to make the amount of one hundred and sixty and $\frac{12}{100}$ ($160.12) dollars, lawful money of the United States, to satisfy the judgment in this action, with interest thereon and costs, out of the personal property of the above H. Stevens, defendant, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the 12th day of May, 1893, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears, I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to said plaintiffs, "J. Nesbitt & Bro.," who were the highest bidders, for the sum of

one hundred and nine ($109) dollars, lawful money, which was the whole price paid by them for the same, the real estate described as follows, to wit:

An undivided ½ of the "Broken Hatchet" mine and mining claim.
An undivided ⅛ of the "Jake" mine and mining claim.
An undivided ⅓ of the "Fraction" mine and mining claim.
An undivided ½ of the "Daisy" mine and mining claim.
An undivided ½ of the "Double B" mine and mining claim.
An undivided ½ of the "North Star" mine and mining claim.
An undivided ⅓ of the "Sunset" mine and mining claim.
An undivided ½ of the "Blue Rock" mine and mining claim.

All of said property being situate in the Ferguson mining
73 district, in the said county of Lincoln and State of Nevada.

That the price of each distinct lot and parcel was as follows: "Broken Hatchet," $35; "Jake," $25; "Fraction," $30; "Daisy," $2.50; "Double B," $2.50; "North Star," $2.50; "Sunset," $2.50, and "Blue Rock," $1.

And that the said real estate is subject to redemption in six months, pursuant to the statute in such cases made and provided.

Given under my hand this 11th day of August, 1893.

J. A. DENTON,
Special Deputy.

(Endorsements as follows:) J. A. Denton, special deputy of Pioche township, county of Lincoln, to J. A. Nesbitt & Bro. Certificate of sale of real estate on execution. Dated August 11th, 1893. Filed in the office of the county recorder of the county of Lincoln, State of Nevada, this eighteenth day of August, 1893. H. W. Turner, county recorder, by Alex. I. Harrison, deputy.

The plaintiff then offered in evidence two deeds from J. A. Denton, as a special constable, to J. Nesbitt & Bro., dated Feb'y 19th, 1894; which deeds and the endorsements thereon are in the words and figures as follows:

74 This indenture, made the (19th) nineteenth day of February, A. D. 1894, between J. A. Denton, special deputy of the justice of the peace, Pioche township, county of Lincoln, and State of Nevada of the first part and J. Nesbitt & Bro. partners of the said county of Lincoln and State of Nevada, of the second part; witnesseth:

That whereas by virtue of a writ of execution issued out of and under the seal of the justice court of the Pioche township, county of Lincoln, State of Nevada, in and for the said county of Lincoln, tested the 15th day of July, A. D. 1893, upon a judgment recovered in said court on the 10th day of July A. D. 1893, in favor of J. Nesbitt & Bro. and against W. L. De Beque to the said constable directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be

found, that then he should cause the amount of said judgment to be made of the lands, tenements and real property belonging to him on the 15th day of July A. D. 1893, or at any time afterwards; and

Whereas sufficient personal property of the said judgment debtor could not be found whereof, he, the said special deputy, could cause to be made the moneys specified in the said writ, he, the said special deputy, did, in obedi*a*nce to said command, levy on, take and seize, all the estate, right, title and interest which the said judgment debtor so had of in and — the lands, tenements, real estate and premises, hereinafter particularly set forth and described, with the appurtenances, and did, on the 10th day of August A. D. 1893,
75 sell the said premises at public vendue at and upon each separate piece and parcel thereof in the said Lincoln county, between the hours of nine in the morning and five in the afternoon of that day, namely at 12 o'clock m., and after having given notice of the time and place of such sale by advertising the same according to law, at which sale the said premises were struck off and sold to the said J. Nesbitt & Bro. for the sum of two hundred and twenty ($220) dollars lawful money, they the said J. Nesbitt & Bro. being the highest bidders and that being the highest sum bidden, and the whole price paid for the same; and

Whereas the said special deputy after receiving from said purchasers the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given and filed in the office of the recorder of the county of Lincoln a duplicate of such certificate; and

Whereas, six months after such sale having expired without any redemption of the said premises having been made,

Now this indenture witnesseth, that J. A. Denton, the special deputy aforesaid, and party hereto of the first part, by virtue of the said writ, and in pursuance of the statute in such cases made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid as aforesaid, by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey and confirm unto the said J. Nesbitt & Bro. their heirs and assigns, all the estate, right, title and interest of the said W. L. De Beque which he had on the 15th day of July A. D. 1893, or at any time afterwards, or now has, of, in, or
76 to all of the following-described premises, viz:

An undivided one-eighth ($\frac{1}{8}$) of the "Jake" mine and mining claim, and an undivided one-fourth ($\frac{1}{4}$) of the "Broken Hatchet" mine and mining claim; an undivided one-half ($\frac{1}{2}$) of the "Fraction" mine and mining claim; an undivided one-eighth ($\frac{1}{8}$) of the "Zip Coon" mine and mining claim; an undivided one-fourth ($\frac{1}{4}$) of the "Daisy" mine and mining claim; an undivided one-fourth ($\frac{1}{4}$) of the "Double B" mine and mining claim; an undivided one-half ($\frac{1}{2}$) of the "North Star" mine and mining claim; and an undivided one-third ($\frac{1}{3}$) of the "Sunset" mine and mining claim. All of

which said mines and mining claims are situate in Ferguson mining district in said county of Lincoln, State of Nevada.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said above described and mentioned premises with the appurtenances, unto the said J. Nesbitt & Bro., their heirs and assigns forever, as fully and absolutely as he the special deputy, aforesaid, can, may, or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof, the said special deputy, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

J. A. DENTON. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

77 STATE OF NEVADA, } ss:
County of Lincoln, }

On this 19th day of February, A. D. 1894, before me, A. A. Young, a justice of the peace in and for Lincoln county, State of Nevada, duly elected and qualified, personally appeared the within-named J. A. Denton, special deputy of the justice of the peace of Pioche township, in said county, whose name is subscribed to the foregoing instrument as a party thereto, personally known to *be* to be the individual described in and who executed the said foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand the day and year in this certificate first above written.

A. A. YOUNG,
Justice of the Peace of Pioche Township,
County of Lincoln, State of Nevada.

(Endorsements:) Deed. J. A. Denton, special deputy, to J. Nesbitt & Bro. Dated Feb. 19th, 1894. Recorded at the request of J. Nesbitt Sept. 14th, A. D. 1896, at 30 min. past 11 a. m., in Book "A" of Mining Deeds, Lincoln county, Nevada; recorded at pages 514, 515, 516, 517, 518. John Shier, county recorder.

78 The defendant objected to the introduction of each of the said deeds upon the ground that neither was shown to have been made, executed, or delivered in consequence of any valid judgment or execution based on any valid judgment, and because no officer of Pioche township could serve or execute such an execution outside of Pioche township, and because it was and is admitted that the "Fraction" mine was and is situated in what was then known and called "Helene" or "De Lamar" township, in Lincoln county, Nevada, and distant about forty miles from the boundaries of Pioche township, in the said county, and because there is no evidence that the said special deputy constable, J. A. Denton, made

the sales, in accordance with the law, by either publishing the notice of such sales or by posting the notices required by law prior to making the sales, which are the foundation of the deeds.

The court overruled the objections and directed that the deeds be admitted and limited for the purpose of showing a color of title and also an adverse possession of the "Fraction" mine as being in the plaintiff from the date of the deeds, February 19th, 1894.

The defendant excepted to this ruling of the court.

The defendant then moved the court to strike out Plaintiff's Exhibit- "2" and "3," which are what he terms "notices of exemption" under the laws of Congress from the doing of annual assessment-work for the years 1893 and 1894, upon the ground that at the time the notice claiming exemption for the year 1893 was filed, to wit, Plaintiff's Exhibit "3," plaintiff had no right of entry or possession to the "Fraction" mine—his only right or interest
79 in connection therewith being his "certificates" of sale above set forth, neither of which conferred upon him right of entry or possession, nor, much less, the right to file the exemption notice marked Exhibit 3, and the defendant moved to strike out the exemption notice marked Plaintiff's Exhibit 2, wherein he claims exemption from doing the work for the year 1894, for the reason that having no right of entry of possession at the end of December, 1893, his notice, Exhibit 3, filed at that time was without authority and unauthorized under the law; assessment-work not having been annually done during the year 1893 upon the claim, the claim became forfeited and became subject to relocation on the first day of January, 1894, and no relocation having been made after its forfeiture of the "Fraction" mine, it remained open public domain during 1894 until the day defendant and Murphy relocated it as the "Sleeper" mine in January, 1895.

The court overruled the motion to strike out the two notices of exemption, and the defendant excepted.

The court here took a recess from five o'clock in the afternoon until 7.30 p. m.

The plaintiff then recalled AUGUST BURTH and asked him the following question:

Q. When did you first recognize Mr. Nesbitt, the plaintiff, as your co-owner in the "Fraction" mine?

The defendant objected to the question upon the ground that it is irrelevant, incompetent, and immaterial, and because it calls for the opinion of the witness rather than for a statement of facts.

The court overruled the objection, and the defendant excepted.

80 The witness then answered:

A. I first recognized him as a co owner with me immediately after the constable's sale in August, 1893, and in September or October, 1893. I came from Helene or Ferguson district to Pioche on the stage and remained in Pioche several days, and while there I told Mr. George Nesbitt that he should file the notices of exemption from work on the Fraction claim.

The defendant moved to strike out the latter part of the answer of the witness as to what he told George Nesbitt.

The court denied the motion, and the defendant excepted.

Q. Have you since that time recognized the Nesbitt Bros. as co-tenants with you in that claim?

Defendant objected to this question as irrelevant, immaterial, and incompetent, and as calling for the conclusion of the witness rather than for a statement of facts.

The court overruled the objection, and the defendant excepted.

A. Yes.

Q. Did you have any conversation in 1894 with the Nesbitt Bros. respecting the filing of an exemption notice for that year?

Defendant here made the same objection as to the latter two questions, and objected on the further ground that the authority to file such a notice for Burth should be made in writing.

The court overruled these objections, and the defendant excepted.

A. I told the Nesbitts to file on the claim. I have been interested in all the work that has been done upon the claim in the years 1895 and 1896. I have never abandoned by interest in the
81 "Fraction" mining claim. I have done my part of all that was necessary to hold the claim.

Cross-examination:

It was in 1893—the fall of 1893—that I told the Nesbitts to file the exemption notice. I think it was in September that I told them; it might have been October, but it was certainly in the one or the other of those months. I know it must have been about that time, because I did not see either of the Nesbitts for about four months after the last of April or first of May, 1893, until the fall of that year. I came over from De Lamar especially for the purpose of telling them that and having them file the exemption on the claim that year. I only wanted to tell them that. I had no other business here. I can write. I did not think of writing to the Nesbitts in regard to filing. I paid five dollars for my stage fare to come over at that time. The man who drove the stage over when I came at that time was named Brown. His name is J. G. Brown. He now lives and does business at Panaca. I told Nesbitt to file on the claim in Nesbitt's store in Pioche. I cannot remember whether I was then in the front or rear of the store; it was near the counter, anyway. All of the prospectors down in that camp had told me I could file a written claim of exemption before I came over here. After I told Nesbitt to file on the claim I was short of money and had to walk back to Helene or De Lamar from Pioche, and the distance is a little over fifty miles. I walked back from Pioche in one day.

82 After I did the discovery work on the claim in 1892 there was no more work done on it until late in 1895 by any of us owners of the "Fraction" claim.

Q. Did not James Murphy, one of the locators of the "Sleeper," work on that ground which you call the "Fraction" and which he called the "Sleeper" for several months during the latter part of the year of 1895?

The plaintiff objected to the question as not being cross-examination. The court sustained the objection, and the defendant excepted.

Q. Didn't Murphy and Davidson do several hundred dollars' worth of work within the boundaries of the "Fraction" claim during the first six months of the year 1895?

Plaintiff objected on the ground that it is not cross-examination. The court sustained the objection, and the defendant excepted.

Q. Were you or the Nesbitts either or together in the exclusive possession of the "Fraction" ground during the year 1894 or 1895, or were you in the year 1895 sometimes in possession and Davidson and Murphy at other times during that year in the possession of the ground embraced in the "Sleeper" and "Fraction" claims?

Counsel for plaintiff here objected that witness Burth has given no testimony of the exclusive possession in him or either of the Nesbitts of the ground in controversy during the year 1893, 1894, 1895, or 1896, and objected to the last preceding question upon the ground that it is not cross-examination.

The court sustained the objection, and the defendant excepted.

83 Q. As a matter of fact, were you or the Nesbitts or either of you in the exclusive possession of the "Fraction" mine during the year 1895, and did not Murphy and Davidson have complete possession of that ground for the larger part of the year?

Plaintiff objected on the ground that the question was not cross-examination. The court sustained the objection, and the defendant excepted.

A. I never mentioned to my attorney, Mr. Sawyer, that I had told the Nesbitts to file the exemption on the "Fraction" claim until six o'clock this afternoon, an hour after the court adjourned from the evening session today.

Q. Didn't you tell the defendant Davidson, in April, 1895, in De Lamar, that you had abandoned your interest in the "Fraction" claim; that he was welcome to it, and that you hoped he would do well out of it?

Plaintiff objected to the question as not being cross-examination. The court sustained the objection, and the defendant excepted.

GEORGE NESBITT recalled:

I had a conversation with Mr. Burth about filing an exemption claim on the Fraction mine in the fall of 1893. He said to me to file or to do as I thought best.

Q. "Since that time have you and your brother, the plaintiff, recognized Mr. Burth as a co-owner in that claim with you?"

Defendant objected on the ground that the question is irrelevant and immaterial and incompetent and calls for the opinion of the witness rather than for a statement of facts. The court overruled the objection, and the defendant excepted.

84 "Yes, sir; we have; we have recognized each other as co-owners in that mine ever since. In the fall of 1893 we were talking about doing the assessment-work on the "Fraction" mine, and we talked about the law allowing miners to file a notice of intention to hold their claims without doing the assessment-work, and he told me to do with his interest as I did with my own. We finally concluded to file the notice, and did the same in 1894. I considered that one name was enough to sign to the notices. I filed them, and my intention was that it was for all."

A. A. MARSHALL sworn and testified for plaintiff:

I lived in Ferguson mining district. I know what is called the "Fraction" mine. I did 17 days' work upon that mine for George Nesbitt in December, 1895. A man named Scully also did five days' work there, and Jenkins did six days' work there. We were doing assessment-work; we did some blasting. I did good hard day's work each day while I was there; used powder and fuse; we used powder, caps, and fuse. We used probably 18 pounds of powder. I should judge that the value of the material we used while I was working was about $25. I think that George Nesbitt did more than two days' work there while I was working. Jenkins and Scully also did good days' work. We would get to work immediately after seven each morning and knock off before dark.

Here witness described several places in which he did work, the size and extent of excavations, and the formations in which the excavations were made.

85 I also worked some time in that tunnel that Jim Murphy had made on the "Fraction" or "Sleeper" mine before we went there in December. I should judge his tunnel was 20 or 30 feet long when we commenced. When we worked in the tunnel we threw the dirt behind us and did not use the wheelbarrow.

We did not do much work in Murphy's tunnel. There had been a great deal of other work done upon the claim that year before we went to work the assessment in 1895.

Q. "How much other work—what was the value of that other work that had been done in December, 1895?"

Plaintiff objected to the question as not cross-examination. Court sustained the objection, and the defendant excepted.

GEORGE NESBITT recalled for cross-examination:

I cannot say that Burth individually ever did any work there or furnished any timbers, nor I cannot tell the month or the year in which the protest survey was made. I think it took two days, at least. I was up there on two different days when they were making the survey. I do not know what the usual and ordinary prices paid for protest surveys are in that district. My brother, the plaintiff, and myself have had several made, but my brother paid, and I do

not know what he paid, and I do not know of any survey that cost $140.

JAMES NESBITT, the plaintiff, was sworn and testified:

I paid the United States Land Office $10 to file this protest. I paid Mr. Swindler $125 to make the adverse survey, and I paid the helpers besides.

86 H. LAWRY recalled for plaintiff:

I am a competent miner. I am familiar with the prices paid for mining labor in De Lamar and what was paid for such labor in 1895–'6. I know the work which the Nesbitts had done upon the "Fraction" claim in 1895—in December—and what thay had done in 1896. I think the work in 1895 was worth $100 or more, and I think the work done in 1896 was worth a good deal more than $100 when you figure the value of the timbers that were necessary to hold the ground in which the shaft was sunk that year. I have no share or interest with Burth.

Here plaintiff offered in evidence the amended answer, which the defendant asked leave to file and which the court declined to permit. The defendant objected on the ground that the answer is irrelevant, immaterial, and incompetent for any purpose. Court overruled the objection, and the defendant excepted.

The defendant here moved the court to strike out the so-called "exemption notice" of 1893, which is marked Plaintiff Exhibit 2, upon the ground that at the time the notice was filed neither of the Nesbitts had such an interest or claim to the mine as entitled or authorized them to enter upon the mine or to avail themselves of the privilege accorded under the act of Congress of November 3, 1893.

The court overruled the motion, and the defendant excepted.

The plaintiff here rested his suit; whereupon the defendant filed his written motion for a nonsuit, which is in the words and figures and is endorsed as follows:

87 STATE OF NEVADA, }
County of Lincoln. }

In the Fourth Judicial District Court.

JAMES NESBITT, Plaintiff, }
vs.
W. M. DAVIDSON, Defendant. }

Now comes the defendant and moves the court to grant a nonsuit in this action and dismiss the same upon the ground that the court has already declared on this trial that the certificates of sale and deeds introduced by plaintiff are absolutely void because they were founded upon a judgment which has likewise on this trial been declared by this court to be void.

Second. Because the plaintiff and his pretended co-owners have

shown no manner or character of actual possession of the Fraction mine during either of the years of 1893 or 1894.

Third. And because the complaint in this action shows that the defendant is in good faith shown to be the owner and to have claimed the possession of the Sleeper mining claim, and that the said Sleeper mining claim is identical and embraces the said Fraction mining claim, and in the testimony already introduced it is shown that the defendant and one Murphy located and occupied said Sleeper mining claim on the first day of January, 1895, and such fact has been admitted and assumed to be true by the conduct of counsel in this case during the trial and prior to this motion.

88 Fourth. And because it appears from the testimony in the case and from the complaint that the defendant and the said Murphy worked upon and developed the said Sleeper mining claim during the years 1895–'6, and during said years and at times occupied and performed various acts of ownership thereon without let or hindrance from the plaintiffs, without his permission or that — any of his pretended co-owners, and openly and notoriously and adversely during said time.

Fifth. And because the plaintiff has utterly failed to show in himself during any two years prior to the commencement of this action any open, notorious, and adverse or exclusive and continuous possession of the Fraction mine or any portion thereof so as to establish any prescriptive right to the same.

HENRY RIVES AND
F. R. McNAMEE,
Attorneys for Defendant.

(Endorsements:) No. 1397, original. Fourth judicial dist. court, State of Nevada, Lincoln county. James Nesbitt *vs.* W. M. Davidson. Motion for nonsuit. Filed January 3rd, 1897. H. J. Goodrich, clerk.

The court overruled the motion, and the defendant excepted.

The defendant, to maintain the issues on his part, here introduced in evidence the affidavit of W. M. Davidson, verified May 31st, 1897, filed on the same day in this cause on his motion for continuance on account of the absence of the witness James Murphy.

89 T. E. EDWARDS was then called as a witness on the behalf of the defendant and testified:

I reside in De Lamar, Nevada, which is in the Ferguson mining district. De Lamar is the largest town in that district, and Helene is a smaller town about 1½ or two miles north of De Lamar. Although I have resided in De Lamar only since May, 1894, I have spent much time in that vicinity and have been engaged in locating and working mines there ever since March, 1892. I am familiar with the Ferguson mining district and have been since its organization. I am also familiar with all of the customs and practices of miners in that district since its organization respecting their modes of locating mines and of posting their notices and having them

recorded. I was the secretary of the only miners' meeting ever held in that district. It was held on the 3rd day of September, 1892. I transcribed the proceedings of that meeting into a book for the recorder, Mr. B. L. Duncan, who was elected recorder of that district at that time. From that time forward to the present date there has never been any change in the mining rules that day adopted. From that time to the present it has been the universal custom of the miners of that district to file a notice of their location with the district recorder, who is now Mr. W. L. Maynard, he having succeeded Mr. Duncan, and after the notice has been recorded in the district mining records they are always sent by the mining locator or by the district recorder to the county recorder of the county and also recorded there in the county records.

Here witness was shown a paper purporting to be a certified copy of the proceedings of the miners' meeting held at Helene,
90 Lincoln county, Nevada, September 3rd, 1892, signed by John Sevenoaks, as president; T. E. Edwards, as secretary, and by various and sundry other persons, and he states that the copy shown him is a correct copy of the proceedings of that meeting and is the one to which he has referred in his previous testimony today.

Here the copy of the proceedings of the meeting was introduced in evidence and marked Defendant's Exhibit "A," and is in the words and figures, with the endorsements thereon, as follows, to wit:

HELENE, NEVADA, LINCOLN CO., *Sept.* 3, 1892.

At a miners' meeting held at Helene, Nevada, Mr. J. Sevenoaks was unanimously elected president and Mr. T. Edwards secretary. On motion, it was ordered that the name of the district be Ferguson district. On motion, it was decided that the limits of the district be as follows:

Beginning at the discovery monument of the Magnolia mine and running thence 10 miles north; thence east to the summit of the Central range of mountains; thence along the summit in a southerly direction twenty miles; thence west to the center of Ely valley; thence north twenty miles.

Upon a motion duly made and seconded, Mr. B. F. Duncan was elected recorder. Upon the motion of — the fee of the recorder was fixed at two dollars for each location for record.

Upon motion, the laws of the United States were to be the district laws.

91 Approved:

JOHN SEVENOAKS, *President.*
T. E. EDWARDS, *Secretary.*
W. D. MAYNARD.
A. W. KEYSER.
H. H. COOPER.
W. CRANDELL.
H. BUTTERFIELD.
J. LEWIS.
CHAS. McDONALD.

Recorded, at the request of T. E. Edwards, Sept. 17th, A. D. 1892, at 7.30 p. m.

H. W. TURNER,
County Recorder,
By ALEX. I. HARRISON, *Deputy*.

Witness continued:

I am familiar with the "Fraction" mine and have been since its location, and also know the "Sleeper" mine and have since its location. The "Fraction" and "Sleeper" claims, as to the boundaries as marked, are covered by the same ground. In 1895, from some time in January to some time in the fall of that year, I was engaged in prospecting chiefly on a claim of mine called the "Timber Trail" in that district and which is near to the Sleeper mine, and I can see distinctly from where I was then working on my "Timber Trail" pretty much all of the "Sleeper" ground. From some time in January to some time in October, 1895, James Murphy was steadily working on the Sleeper mine. Davidson also worked there with Murphy a great deal. They did a large amount of work on the Sleeper claim that year and between those last dates.

92 I saw Murphy working and blasting there more than twenty times; Davidson almost as often. I passed over the Sleeper claim usually in going to my work. They did a great deal more than $500 worth of work on that claim that year.

Here witness described the length and size of three tunnels and two cuts which he related Davidson and Murphy had performed during the year of 1895, prior to the end of October.

Q. Do you know where what is called the "Sleeper" claim lies?
A. Yes, sir; it has been shown to me.

The question was objected to by plaintiff and asked to be stricken out. The court overruled the motion. The plaintiff took an exception.

Mr. RIVES: Mr. Edwards, is the Sleeper mining claim in Ferguson mining district, as described by you?

A. Yes, sir; it lies in the district.

Q. Do you remember seeing any person at work on the Sleeper mining claim during the year 1895?

A. Yes, sir; I saw James Murphy at work there that year.

Q. How often during the year 1895 did you see Mr. Murphy at work there? Did you see him more than once?

A. I saw him there probably fifteen or twenty times. I was doing assessment-work on one of my claims, about seven or eight hundred feet away from him—from where he was at work. I was working on my "Timber Trail" mine, and I could see him very easily from my dump. I was up there altogether, I think, thirty-four days. I worked from five to seven hours a day.

Q. You worked about a full month?

A. Yes; I was up there every day for a full month; a little more than a month.

Q. Did you ever go over on the claim to where he was working?

93 A. No, sir; I just observed him from where I was at work on my own place.

Q. You don't know what work he done, only, you only know what he told you he had done?

A. Well, afterwards I went on the claim and saw the work that he told me he had done, and I estimated it.

Q. What time elapsed between the time or the first day that you went up there of those thirty-four and the last day?

A. I think it must have been nearly two months. I could not state exactly, because between the dates there would be sometimes I would not work for a whole week.

Q. Did you observe Mr. Murphy working there when you went back, after laying off a week?

A. Yes, sir; I saw him there, and I heard him blasting there. I heard him blasting every day I was there.

Q. Did you ever see the "Sleeper" location notice in the monument around there?

A. No, sir.

Q. Did you ever see any of the corner monuments of the Sleeper claim?

A. Yes, sir.

Q. How many?

A. I saw two, the northwest and northeast corners. I measured between the two.

Q. What was the distance, if you remember?

A. A little over seven hundred and fifty feet, I believe.

Q. Did you visit the claim in 1896?

A. Yes; I walked over a portion of it in 1896.

Q. When you was walking over there, in 1896, did you observe any work being done on it in that year?

94 A. Yes, sir; I saw Mr. H. M. Cratsenberg working on it in 1896.

Q. What portion of the claim was he working on?

A. Well, he was working in one of the holes that Mr. Murphy had been working in.

Q. Do you know how much work he did there that year?

A. No, sir.

Q. How many times did you see him there at work that year?

A. I saw him there once or twice.

Q. Do you know where the location or discovery monument of the Sleeper is?

A. No, sir; I don't know where the location monument is. I don't know anything about the location monument. I never saw the location monument. I never saw the notice of location. I just saw those two corners, the northwest and the northeast corners.

Q. How do you know that those monuments were the northwest and the northeast corners of the Sleeper claim?

A. Well, I found a little piece of paper in them, one marked the

northwest and one the northeast corner of the Sleeper claim. It was laid on a pile of rocks and a stone on top of it.

Q. Was there any other monument on the Sleeper claim that you remember?

A. There was one other close to the Vigilant that was inside of the line of the Sleeper. I remember seeing that.

Q. How much work was there done, if you remember, on the Sleeper during the year 1895?

A. I never examined the work. I judged from the dumps. There was several different dumps, and from that there appeared to be a good deal of work done. There was several dumps,
95 showing that there had been a good deal of work done on that mine.

Q. Were you ever there when Murphy was working?

A. No, sir.

Q. Did Murphy work in more than one place?

A. Yes, sir. He changed around. He worked in three different places.

Mr. MURPHY: Mr. Edwards, I ask you as a witness in this case what was the custom of the miners in that district with reference to doing the assessment-work on their claims during the years 1893 and 1894?

A. They generally filed affidavits of intention.

Q. What was the custom of the miners in the Ferguson mining district in locating mining claims in 1895?

A. Well, they went on the ground and located it, put up their location monument, put the notice in it, and put up their corner stakes, recorded the notice with the district recorder, and had a copy of it recorded with the county recorder.

Q. What time in 1895 was you on that claim?

A. The first time I was on that claim in 1895 was in December.

Q. Wasn't you there before that, when Murphy was working there?

A. I told you that I was never on that claim while Murphy was there. I only see him from my own claim. Mr. Cratsenberg worked on the claim in 1896. He told me he was doing assessment-work on the "Sleeper" claim for the year. I frequently saw him while he was engaged at it. I am a practical miner, although I keep a saloon now, and I know the value of work in the Ferguson district. I have paid out a good deal of money for assessment-work in that region, and am familar with the prices paid for it and its
96 value. I saw the work which was done on the Sleeper by Cratsenberg in 1896, and it certainly equalled or exceeded $100 in value, and besides the value of his work and the material, that he used, such as powder and fuse, caps, picks, and other articles would be from $25 to $30 in performing that work.

I frequently saw Davidson on the claim in 1896. He was sometimes at work upon the claim; at other times he seemed to be measuring or surveying upon it.

Cratsenberg did work in several places on that claim in 1896. No work was done by Marshall, Scully, or Jenkins on the "Fraction"

or "Sleeper" ground before the month of December in 1895, nor did I see any of the owners of the "Fraction" claim upon it before December, 1895. If any of them had been at work on the claim before that time during that year I would certainly have seen them.

H. N. CRATSENBERG was called for the defendant and testified as follows:

I am a miner by occupation and I have been steadily at work in Ferguson mining district since early in 1894. In 1896, Mr. Nichols, the superintendent of the De Lamar Gold M'g Co., employed me to work upon the Sleeper claim.

He and Davidson took me up there and showed me where to work. We went to the location point and around to the different corner monuments. This was late in the summer or early fall of 1896. There were five of the monuments and they were all up in good condition at that time and had papers folded and grass
97 around them. That is the practice in that district for miners to place their papers in the monument, in a tuft of grass between the rocks, so as to hold it and keep it dry and from blowing away. The monuments were between two and three feet high and about the usual size for the district. I did a good deal of work at different places on the claim at that time. I extended one tunnel a little over twenty feet in length; it was 3½ feet wide and 6½ feet high. The tunnel was run in hard quartzite; it was what I call very hard ground and all required blasting. It could not at that time have been run for less than $7 per foot.

The formation was very solid. I used powder, fuse, and caps and the ordinary tools. I worked at other places besides this tunnel. At the request of Mr. McNamee, who is attorney here for Mr. Davidson, I made an affidavit that the work I did upon the "Sleeper" claim that year was worth more than $100, and I still say it was worth a great deal more than that.

Mr. Nichols, the superintendent of the De Lamar Company, paid me for my work that year on the Sleeper claim, but Mr. Davidson was frequently up there while I was at work.

RUSSELL ALLEN was then called as a witness for the defendant.

I live in Pioche. I have lived there for a great many years. My general business is driving stage. During September, October, and November, 1893, I was driving stage between here and Desert
98 springs east of the road to Milford. I know J. G. Brown. During all those months I would drive out to Desert springs one day and the same day Brown would drive in from Desert springs to Pioche. Thus we drove six days out of each week during that time. Before Brown commenced driving stage about the 1st of September on the Desert Springs route, he was doing assessment-work on a claim right here on the edge of Pioche. I know he did not and could not have driven stage from De Lamar to Pioche at any time during those months, and I know Brown never did drive on the De Lamar line in September or October, 1893, nor did I.

Here the court stated that it only considered the two certificates of sale issued by Denton, as special deputy constable, and the two deeds executed by him in the same capacity, as in evidence only for the purpose to show a "color of title."

Here the defendant offered in evidence the record of the board of county commissioners of Lincoln county, Nevada, showing that the town of Helene and vicinity was constituted and organized into a separate township, and a justice of the peace and a constable appointed there as early as 1892.

That both the constable and the justice of the peace held office and exercised their functions as such officers in Helene township during all of the year 1893, and that Helene township included and embraced within its boundaries the "Fraction" mine and every part thereof.

The plaintiff objected to the evidence upon the ground of its being irrelevant, immaterial, and incompetent.

The defendant stated to the court that the evidence was offered for the purpose of establishing that at the time *of* the two suits of "Nesbitt Bros. against Stevens" and "Nesbitt Bros. against
99 De Beque" were entered, and that — the time judgment was rendered, and at the time the executions were issued, and at the time the certificates of sale were made, and at the time the deeds were executed there was — regularly authorized, qualified, and acting justice of the peace in said township, and also a regularly acting, qualified, and authorized constable acting in said Helene township, and that therefore there was no authority in the justice of the peace, A. A. Young, of Pioche township, to deputize a special officer to serve the pretended void execution or to execute the pretended and void certificates of sale and deed which have been offered and received in evidence in behalf of plaintiff in this case.

The court sustained the objection of the plaintiff to the evidence, and the defendant excepted.

W. H. DAVIDSON, the defendant, was then called, sworn, and testified:

I reside in De Lamar, Nevada; have resided there most of the time for the past five years. I am a surveyor and miner. I know the premises in controversy in this case called the "Sleeper," and the certain mines known as the Monitor, Lookout, and the Cliff. I helped to make the map which is offered by the defendant. It is correct and made from actual measurements.

I am familiar with the customs, rules, and practices of miners in Ferguson district at the present time, and those customs which they have followed during the last five years. It is invariably the cus-
tom of miners in that district to have their notices of location
100 recorded with the district recorder, and a copy, also, with the county recorder at Pioche.

B. L. Duncan was the first mining recorder of Ferguson mining district, and W. D. Maynard succeeded him and is now the recorder of that district. In 1895 John Shier was county recorder of Lincoln county, Nevada.

The location notice or certificate of location of the "Sleeper" claim was recorded with the mining recorder in January, 1895, and with the county recorder a day or two afterwards.

James Murphy and myself located the "Sleeper" claim on the first of January, 1895. Murphy put up all the monuments. He put up five; one at the location point and one at each four corners. They were good, substantial, firm rock monuments, each about three feet high. In the monument at the point of discovery the location notice of the "Sleeper" claim was placed. I saw it in the monument frequently. I do not know whether I wrote the original notice, or Murphy, but I am familiar with its contents and would recognize a copy. I do not know what became of the original notice of location, neither the one which was posted nor the one which was recorded. I have looked in the monument for the one which was posted and have made inquiries for it, but have never been able to find either, and I know that it is lost or has been destroyed.

Here witness was shown what purported to be the location notice of the "Sleeper" claim, and he stated:

This is the notice which we had recorded. A copy of this notice was posted on the claim the first day of January, 1895, and immediately afterwards it was recorded.

(Here the notice of location of the "Sleeper" claim was introduced in evidence and marked Defendant's Exhibit "B.")

101 After the location of the "Sleeper" Murphy and I commenced work on the claim and worked on it off and on from that time until October, 1895. We did more than $500 worth of work on the "Sleeper" claim in 1895. We ran a tunnel south of the discovery point on the claim 42 feet. We ran another tunnel 28½ feet at another point. We also ran another tunnel about 15 feet and sunk a shaft about 8 feet deep. These tunnels are run in hard quartzite rock and require constant blasting. They are worth $7.00 per foot to run them. They are 3½ feet wide by 6½ feet in height. Cratsenberg extended one of these tunnels in 1896 a little more than twenty feet for the purpose of performing the assessment-work upon the claim for that year. He also sunk a small hole for the purpose of starting a shaft on the claim that year. I made arrangements with Mr. Nichols, the superintendent of the De Lamar Company, to have Cratsenberg do the work which he performed on the claim in 1896, and caused Mr. Nichols to pay Cratsenberg for his work, and the work which he did that year on the claim was for the purpose of performing the assessment-work and also to develope the claim.

After he had finished the work I had *by* attorney, Mr. McNamee, obtain an affidavit from Cratsenberg that he had performed for the year more than $100 worth of assessment-work on the "Sleeper" claim, and I sent the affidavit to Carson, to the United States land office, when I made my application for a patent to the "Sleeper" claim.

During the year 1895 I did forty-eight full days' work upon the "Sleeper" claim, and James Murphy, who owned in the claim with me at the time, did one hundred and three days' work upon the

claim between the 1st day of January and the end of October of that year.

102 There is a good deal of dirt in one of the tunnels which Murphy and I ran which was broken down and never wheeled out of the tunnel. This rock and dirt was broken in that tunnel in December, 1895, by Marshall, Scully, and Jenkins. The dirt is there yet.

Besides posting the notice at the discovery point of the "Sleeper" claim we also placed pieces of paper in each corner monument, and on each of these pieces of paper was written the name and the date of location and the corner intended to be designated, such as the "northwest" corner and the "southwest" corner, the "northeast corner" and the "southeast corner." The location notice remained in the monument for more than a year and a half, and some of these corners notices are still in the monuments, and the monuments are all standing there now or were a month ago.

James Murphy and I were the only locators of the "Sleeper" claim; we each owned a half interest in the original location. Murphy deeded his one-half to me last September. I had the deed recorded, but I have lost it. This deed shown me and which purports to be a certified copy of the deed from Murphy to me conveying his interest in the "Sleeper" claim is a correct copy, in my judgment.

(A certified copy of the minutes of the miners' meeting referred to by witness Edwards as having been held on the 3rd day of September, 1892, was here introduced in evidence and marked Defendant's Exhibit "A.")

We obtained fair mineral in several places in excavating upon the "Sleeper." Croppings containing mineral were found in many places on the claim.

(Here defendant rested.)

103 In rebuttal the plaintiff called H. LAWRY, who testified:

I saw the "Sleeper" notice in the monument on the ground. It was posted in the same monument that the old "Fraction" notice had been previously posted in. I was present when August Burth and James Murphy had a conversation in my cabin, in April or May, 1896, about the "Sleeper" and "Fraction" locations.

Q. What was that conversation?

The defense objected to any conversation unless the defendant was present.

Counsel for plaintiff stated that he did not claim that defendant was present at this conversation, but that the defendant's grantor, Murphy, was present. The defendant then objected to the admission of any conversation between the witness and August Burth upon the ground that it is irrelevant, immaterial, and incompetent, because the defendant was not present and because no admissions or statements which were made by Murphy could in any way affect the interest of defendant.

The court overruled the objection and permitted the testimony, with leave to the defendant to move to strike it out. Defendant excepted.

The witness continued:

I heard Murphy and Burth discussing about this claim in my cabin. Murphy said to Burth: "We do not want to beat you out of anything, Gus. Nesbitt is the one we're after. We will give you back your interest."

104 H. M. CRATSENBERG was then called in rebuttal and testified:

I received my pay for the assessment-work which I did upon the "Sleeper" in 1896 from Mr. Nichols, at the De Lamar Company's office. The pay was one of the De Lamar Company's checks, and I made an affidavit, at the request of Mr. McNamee, that I had performed at least $100 worth of work upon that claim in 1896. I do not remember for whose benefit the affidavit said of the work done. I thought I was working for the company. Mr. Oxnam sent me there, and Mr. Reynolds, his foreman at the mine, came up once or twice while I was working. Mr. Davidson did not come up to see me while I was working.

GUS BURTH was called in rebuttal and testified:

The notice of the location of the "Sleeper" and the location of the "Fraction" were both placed in the same monument—the discovery monument of the "Fraction" that I built. I had a conversation with Murphy and Davidson about doing the work on the claim.

Q. Did you ever notify them not to work upon the claim?

The defendant objected to the question as being irrelevant, immaterial, and incompetent and calling for an opinion of the witness instead of his language. The court overruled the objection, and the defendant excepted.

A. I notified them that it was my claim and not to do any work there. "This was in May, 1895."

Q. Did you notify them in any other manner than by telling them—did you post a notice of any kind?

105 Objected to as irrelevant and immaterial and not in rebuttal and so indefinite as to be inadmissible unless the time is established.

The court overruled the objection, and the defendant excepted.

A. I posted a notice written on a shingle that I would not be responsible for any work done on the claim, and that the "Fraction" mine would not be responsible; that is all.

Q. Did you ever have any conversation with Murphy in a cabin about the "Fraction" or "Sleeper" claims?

Objected to as irrelevant, immaterial, and incompetent for any purpose, and because statements and admissions made by Murphy could not affect the rights of defendant.

The court overruled the objection, and the defendant excepted.

A. I had a conversation with Murphy in Lawry's cabin. He said: "Gus, we are not trying to beat you out of your interests, and if we sell we will pay you for it or we will give you your interests back."

Here counsel for defendant moved to strike out all of the testimony of Burth and Lawry respecting conversations with Murphy and the testimony of Cratsenberg upon the ground that all of the same is irrelevant, immaterial, and not in rebuttal, and cannot affect the title of the defendant to the "Sleeper" claim, and in that the conversation of Murphy related simply to paying a compensation to Burth to obtain "peace and to avoid trouble."

The court overruled the motion, and the defendant excepted.

106 (Here counsel agreed that all of the papers in the case of "Nesbitt & Bro. *vs.* De Beque and J. Nesbitt & Bro. *vs.* H. Stevens" should be considered in evidence for the purpose of explaining the force and effect or want of force and effect to which the two certificates of sale and the two deeds introduced by plaintiff may be entitled or not entitled.)

(The plaintiff then rested.)

The foregoing, with such documentary evidence as was offered or received upon the trial and which may be read and referred to on the hearing of the motion for a new trial, constitutes all of the testimony in the case.

On June 5th, 1897, the court rendered a judgment in favor of the plaintiff and against the defendant for the recovery of the premises in dispute and for costs of suit, including plaintiff's expense of surveying and filing protest.

And decreed that the plaintiff and his co-owners and his cotenants are the owners of the "Fraction" mine as the same is described on the mining records and the complaint in this action, and that their title thereto is quieted, and that the defendant is not entitled to a United States patent to that portion of the "Sleeper" mining claim embraced within the boundaries of the "Fraction" mining claim, and that the plaintiff have and recover from defendant the sum of $130.00 as damages, and for his costs of suit, taxed at $256.00.

To the entry of which judgment the defendant excepted.

107 The court filed no findings of fact or conclusions of law in support of the judgment.

On the said 5th day of June, 1897, the court made the following order:

"It is hereby ordered that the defendant be allowed forty days in which to file and serve a notice of motion and statement on motion for new trial."

Counsel for the defendant requested the court to make and render its decision in writing, to file its findings of fact and conclusions of law. The court declined to do so, but stated that he might in the future write a decision if he had time, but directed counsel for plain-

tiff to present the form of judgment. The court has not made or filed any decision or findings in writing.

To the failure of the court to render its decision in writing the defendant excepted.

On July 3rd, 1897, the respective counsel stipulated that the defendant should have to and including August 5th, 1897, within which to file and serve a notice of motion for new trial and statement on motion for new trial.

The defendant makes the following specifications — error, particularly in which the evidence is insufficient to justify the decision, and that the same is against the law:

The court erred in quieting the title of the plaintiff to the "Fraction" mine or any other premises, in that the evidence establishes clearly that the plaintiff and George Nesbitt have not now and never had any title or right of possession or right of entry into or upon the "Fraction" mine or any portion thereof, and in

108 that the evidence establishes that the plaintiff's so-called paper title was absolutely void and of no effect for any purpose, in that neither of the certificates of sale of the special deputy constable gave the plaintiff or his co-owners any right of entry upon or right of possession to the "Fraction" mine, nor did they give the plaintiff or his brother the right to file the certificates claiming the privilege of exemption under the law of Congress from the doing of the necessary assessment-work upon the claim for the years 1893 and 1894, and in that no real owner, or such "claimant" as is contemplated by the act of Congress permitting mining claims during that year to be held without annual assessment-work, was filed by Burth, Debeque, or Stevens, the locators of the claim, and a notice of exemption from work and claim to the mine filed by plaintiff and his brother was not authorized by the congressional act, and was filed at a time when plaintiff and his brother had no right of entry or right of possession on or of the "Fraction" mine, and because the evidence shows that by reason of the failure of any owner or legal "claimant" to the "Fraction" mine to file his claim in 1893, that he intended to hold, keep, and work the mine, and that he availed himself of the privilege conferred by the act of Congress — April 3rd, 1893, the said "Fraction" mine became forfeited and was part of the public domain, and could only be thereafter taken or appropriated in the manner provided by the local laws, customs of miners, and the act of Congress of May 10th, 1872, by means of a relocation, and no such relocation was ever made by the plaintiff or his brother or Burth, nor other person, until January 1st, 1895, when the defendant and James Murphy relocated the same as the "Sleeper."

109 The evidence is insufficient to sustain the judgment and the judgment is contrary to law, in that the deeds of the dates of February 19th, 1894, are void and of no effect in that, that they are not founded upon any judgment, and are shown to have been deeds made by a special deputy constable, who had no right to act in Helene township, and who never had possession of a right of possession to the "Fraction" mine, and because they do not pretend

to convey more than the interest which De Beque and Stevens had in that mine in August, 1893, the date of the certificates, and the evidence shows that that interest of De Beque and Stevens had been forfeited by their failure to file the notice required by the acts of Congress of Nov. 3rd, 1893, within that year, and because the said deeds are not founded upon any judgment or other authority, and neither convey anything, nor do they constitute a "color of title," and because the evidence of plaintiff failed to establish that he had been in either the notorious, open, exclusive, or adverse possession of the premises in dispute for two years before the commencement of this action.

The court erred in not granting the nonsuit upon the grounds stated in the motion therefor.

The defendant specifies as errors of law:

I.

That the court erred in overruling each and every objection which it did overrule which was interposed by the defendant to the testimony introduced on behalf of the plaintiff for the reasons stated in the grounds of each one of those objections, and because each of these objections are valid and should have been sustained.

110 II.

The court erred in sustaining each objection which it did sustain which was interposed by the plaintiff to the testimony which was offered on behalf of the defendant.

III.

The court erred in not permitting the defendant to cross-examine the witnesses and to ask the questions which are shown in the statement to have been propounded by the defendant and objected to by the plaintiff, in that they were legitimate questions in cross-examination concerning subjects which had been testified to by the respective witnesses for the plaintiff, and the cross-examination was particularly calculated to disprove the plaintiff's contention that he had been in the actual, adverse, open, notorious, and exclusive possession of the "Fraction" mine for more than two years preceding the commencement of this action.

IV.

The court erred in not permitting the defendant to file his amended answer.

The foregoing engrossed statement has been agreed upon by us and is correct.

November 5th, 1897.

GEO. S. SAWYER,
F. X. MURPHY, AND
BENJ. SANDERS,
Attorneys for Plaintiff.
HENRY RIVES,
F. R. McNAMEE, AND
T. J. OSBORNE,
Attorneys for Defendant.

111 The foregoing engrossed statement has been settled and allowed by me and is correct.

G. F. TALBOT,
District Judge.

STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing engrossed statement on motion for new trial is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

(Endorsed:) # 1. Original, No. 1397. District court, 4th district' State of Nevada, Lincoln county. James Nesbitt, pl't'f, *vs.* W. M. Davidson, d'f't. Engrossed statement on motion for new trial. Filed November 8th, 1897. H. J. Goodrich, clerk.

112 In the District Court of the Fourth Judicial District of the State of Nevada, Lincoln County.

JAMES NESBITT, Plaintiff,
vs.
DE LAMAR'S NEVADA GOLD MINING COMPANY (Substituted for Wm. Davidson), Defendants.

The motion for a new trial in the above-entitled action is hereby overruled for the reasons intimated by the court at the close of the argument on the motion.

G. F. TALBOT, *Judge.*

(Endorsed:) # 1. No. 1397. District court, county of Lincoln. James Nesbitt *vs.* De Lamar's Nev. Gold M. Co. Order overruling motion for new trial. Filed December 20th, A. D. 1897. H. J. Goodrich, clerk.

113 STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing order overruling motion for new trial is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

114 In the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln.

JAMES NESBITT, Plaintiff,
vs.
DE LAMAR'S NEVADA GOLD MINING COMPANY (Substituted for W. M. Davidson), Defendant.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this State from the judgment in said action therein made and entered in the said district court on the fifth day of June, A. D. 1897, in favor of said plaintiff and against said defendant, and from the whole thereof, and also from the order of said court made and entered in said action on the 20th day of December, A. D. 1897, overruling said defendant's motion for a new trial of said action.

HENRY RIVES AND T. J. OSBORNE,
Attorneys for Defendant.

To Geo. S. Sawyer, F. X. Murphy, and Ben. Sanders, att'ys for plaintiff.

(Endorsed:) # 1.

Due service of the within notice of appeal by copy thereof
115 is hereby admitted this 28th day of December, A. D. 1897, after the said notice had been filed.

GEO. S. SAWYER,
F. X. MURPHY, AND
BENJ. SANDERS,
Attorneys for Plaintiff.

(Endorsed:) # 2. District court, 4th judicial district, county of Lincoln, State of Nevada. James Nesbitt, pl'ff, *vs.* De Lamar's Nevada Gold Mining Company, def't. Notice of appeal. Filed December 28th, 1897. H. J. Goodrich, clerk. Henry Rives and T. J. Osborne, att'ys for defendant.

116 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing notice of appeal is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

117 In the District Court of the Fourth Judicial District in and for the County of Lincoln, State of Nevada.

JAMES NESBITT, Plaintiff,
vs.
DE LAMAR'S NEVADA GOLD MINING COMPANY (Substituted for W. M. Davidson), Defendant.
} Undertaking on Appeal.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the State of Nevada from a judgment entered against it in said action in the said district court in favor of the plaintiff in said action on the fifth day of June, A. D. 1897, for two hundred and fifty-six ($256.00) dollars, costs of suit, and from an order of said court entered on the 20th day of December, 1897, denying defendant's motion for a new trial thereof:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, A. S. Thompson, of the county of Lincoln, State of Nevada, and N. P. Dooley, of the same county and State, do hereby, jointly and severally, undertake and promise on the part of the appellant that the said appellant will pay all damages
118 and costs which may be awarded against it on the appeal, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further, jointly and severally, bound in the further sum of five hundred and twenty-five ($525.00) dollars, lawful money of the United States (being double the amount named in the said judgment), that if the said judgment appealed from, or any part thereof, be affirmed the appellant shall pay, in lawful money of the United States, the amount directed to be paid thereby or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

A. S. THOMPSON. [SEAL.]
N. P. DOOLEY. [SEAL.]

Dated Dec. 28th, 1897.

(Endorsements:) # 1.

STATE OF NEVADA, *County of Lincoln,* } ss:

A. S. Thompson and N. P. Dooley, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being

severally duly sworn, each for himself says that he is worth
119 the amounts specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and householder or freeholder within said county.

A. S. THOMPSON.
N. P. DOOLEY.

Subscribed and sworn to before me this 28th day of December, A. D. 1897.

T. J. OSBORNE,
[SEAL.] *Notary Public, Lincoln County, Nevada.*

(Endorsed:) # 2. In the district court of the fourth judicial district in and for the county of Lincoln, State of Nevada. Undertaking on appeal. James Nesbitt, plaintiff, *vs.* De Lamar's Nevada Gold Mining Co., defendant. Filed Dec. 28th, 1897. H. J. Goodrich, clerk.

120 STATE OF NEVADA, } *ss:*
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing undertaking on appeal is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 11th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

121 Justice Court, Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of "J. Nesbitt & Bro.," Plaintiffs,
vs.
H. STEVENS, Defendant.

Plaintiffs complain of defendant and for cause of action allege—That heretofore, to wit, on the 26th day of March, A. D. 1893, the said defendant became and was indebted to said plaintiff in the sum of one hundred and sixty $\frac{12}{100}$ ($160.12) dollars for goods, wares, and merchandise theretofore sold and delivered by said plaintiffs to said defendant at his request, and that no part thereof has been paid.

Wherefore plaintiffs ask judgment against said defendant for the sum of one hundred and sixty $\frac{12}{100}$ ($160.12) dollars, with interest thereon from the 26th day of March, A. D. 1893, and for all the costs of this action.

GEO. S. SAWYER,
Att'y for Plaintiff.

(Endorsed:) # 1.

122 STATE OF NEVADA, } ss:
County of Lincoln, }

James Nesbitt, being duly sworn, upon oath says that he is one of the plaintiffs in the above-entitled action, and that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

JAMES NESBITT.

Subscribed and sworn to before me this 12th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

(Endorsed:) #2. No. 1397. Justice court, Pioche township, county of Lincoln. J. Nesbitt & Bro. *vs.* H. Stevens. Complaint. Filed May 12th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. This complaint was read and referred to on the hearing of the motion for a new trial in said case. G. F. Talbot, J. Geo. S. Sawyer, attorney for plaintiffs.

123 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing "complaint" in the case of J. Nesbitt & Bro. *v.* H. Stevens, in the justice's court, Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. N. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

124 *Justice's Court Summons.*

STATE OF NEVADA, } ss:
County of Lincoln, }

In Justice's Court, Pioche Township.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of J. Nesbitt & Bro., Plaintiffs,
against
H. STEVENS, Defendant.

The State of Nevada to H. Stevens, defendant:

You are hereby summoned to appear before me, a justice of the peace in and for Pioche township, county and State aforesaid, at my office, in Pioche, on the 10th day of July, A. D. 1893, at 10 o'clock a. m. of that day, to answer the complaint of J. Nesbitt &

Bro., wherein they claim to recover from you the sum of one hundred and sixty $\frac{12}{100}$ dollars for goods, wares, and merchandise by them sold and delivered to you at your instance and request, as fully set forth in plaintiff's complaint on file in my office.

And you are hereby notified that if you fail to appear and answer the complaint, as aforesaid, judgment will be taken
125 against you for the said sum of one hundred and sixty $\frac{12}{100}$ ($160.12) dollars, with interest from the 26th day of May, A. D. 1893, and costs of suit.

To the sheriff or any constable of said county, greeting.

Make legal service and due return hereof.

Given under my hand this 12th day of May, A. D. 1893.

A. A. YOUNG,
Justice of the Peace, County and State Aforesaid.

Attest: A true copy of the original summons.

(Endorsed:) # 1. No. 1397. Summons. Justice's court, Pioche township, Lincoln county, State of Nevada. J. Nesbitt & Bro. *vs.* H. Stevens. Nesbitt *vs.* Davidson. Within summons was read and referred to on hearing of motion for a new trial in said case. G. F. Talbot, J.

126 STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing "summons" in the case of J. Nesbitt & Bro. *vs.* H. Stevens, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of the said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

127 In the Justice's Court of Pioche Township, in the County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of J. Nesbitt & Bro., Plaintiffs,
vs.
H. STEVENS, Defendant.

Writ of Attachment.
Demand, $160.12.

The State of Nevada to the sheriff or any constable of the county of Lincoln, Greeting:

You are hereby commanded to attach and safely keep all of the property of the above-named defendant in said Lincoln county not

exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, to wit, one hundred and sixty $\frac{12}{100}$ dollars, besides the costs, unless the said defendant shall give you security by the undertaking of two sufficient sureties in an amount sufficient to satisfy said demand, besides costs, in which case you will take such undertaking.

Make due return hereof.

Given under my hand at said township the 12th day of May, A. D. 1893.

A. A. YOUNG,
Justice of the Peace of said Township.

128 (Endorsed.)

#1.

I hereby certify that I received the within writ on the 12th day of May, A. D. 1893, and duly executed the same by levying upon the following property belonging to said defendant and situate in the Ferguson mining district, in the said county of Lincoln, State of Nevada, to wit: ½ of the "Broken Hatchet" mine, ½ of the "Blue Rock" mine, ½ of the "Daisy" mine, ½ of the "Fraction" mine, ½ of the "Double B" mine, ½ of the "North Star" mine, ⅓ of the "Sunset" mine, and ⅛ of the "Jake" mine.

Dated May 22nd, 1893.

J. A. DENTON,
Special Deputy.

(Endorsed:) #2. No. 1397. Justice court, Pioche township county of Lincoln. J. Nesbitt & Bro. *vs.* H. Stevens. Writ of attachment. I hereby deputize J. A. Denton to serve and execute the within writ of attachment. A. A. Young, J. P. Filed May 22nd, 1893. A. A. Young, J. P.

129 Justice Court, Pioche Township, County of Lincoln, State of Nevada.

J. NESBITT & BRO., Plaintiffs,
vs.
H. STEVENS, Defendant.

STATE OF NEVADA,
County of Lincoln, } *ss:*

James Nesbitt, being duly sworn, on oath says that he is one of the plaintiffs in the above-entitled action.

That said defendant has departed from said State of Nevada and cannot after due diligence be found therein, and that service of summons upon him in said action cannot be made except by the publication thereof.

Wherefore said affiant asks that an order be made by the justice of said court that the service of the summons in the said action be made by the publication thereof.

J. NESBITT.

Subscribed and sworn to before me this 13th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

(Endorsed:) #1. No. 1397. Justice court, Pioche town-
130 ship, county of Lincoln. J. Nesbitt & Bro. *vs.* H. Stevens. Affidavit for publication of summons. Filed May 13th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. This affidavit was read and referred to on the hearing of the motion for a new trial in said case. G. F. Talbot, J.

131 STATE OF NEVADA, } *ss.*:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing "affidavit for publication of summons" in the case of J. Nesbitt & Bro. *vs.* H. Stevens, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,

[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

132 Justice Court, Pioche Township, County of Lincoln, State of Nevada.

J. NESBITT & BRO., Plaintiffs, }
vs.
H. STEVENS, Defendant. }

Upon reading and filing the affidavit of James Nesbitt, one of the plaintiffs in the above-entitled action, and it appearing therefrom that the said defendant has departed from said State of Nevada and cannot, after due diligence, be found therein, and that personal service of summons in said action cannot be made upon him, and it also appearing by the complaint in said action, duly verified, that a cause of action exists against said defendant:

It is therefore ordered that the service of the summons in said action be made by the publication thereof in the Weekly Lode, a newspaper published at Pioche, in said county, for six successive weeks, at least once a week during that term.

Witness my hand the 13th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

133 (Endorsed:) #1. Justice court, Pioche township, county of Lincoln. J. Nesbitt & Bro. *vs.* H. Stevens. Order of publication of summons. Filed May 13th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. The within order for publication of summons

was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

134 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for the said county of Lincoln, do hereby certify that the annexed and foregoing "order for publication of summons" in the case of J. Nesbitt & Bro. *vs.* H. Stevens, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

135 In the Justice Court, Pioche Township, in and for the County of Lincoln.

J. NESBITT AND BRO., Plaintiffs,
against
H. STEVENS, Defendant. } Affidavit of Publication of Summons.

STATE OF NEVADA, } ss:
County of Lincoln, }

N. P. Dooley, of said county, being duly sworn, says:

That he is a white male citizen of the United States over twenty-one years of age, and is competent to be a witness on the trial of the above-entitled action; that he is the proprietor of the Lode, a newspaper printed and published in the said county; that the summons, of which the annexed is a printed copy, was published in said newspaper at least six consecutive weeks, commencing on the 20th day of May, A. D. 1893, and ending on the 8th day of July, A. D. 1893.

N. P. DOOLEY,
Proprietor and Publisher.

Subscribed and sworn to before me this 10th day of July, A. D. 1893.

A. A. YOUNG, *J. P.*

136 *Justice's Court Summons.*

In the Justice's Court, Pioche Township.

STATE OF NEVADA, } ss:
County of Lincoln, }

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of J. Nesbitt & Bro., Plaintiffs,
against
H. STEVENS, Defendant.

The State of Nevada to H. Stevens, defendant:

You are hereby summoned to appear before me, a justice of the peace in and for Pioche township, county and State aforesaid, at my office, in Pioche, on the 10th day of July, A. D. 1893, at 10 o'clock a. m. of that day, to answer the complaint of J. Nesbitt & Bro., wherein they claim to recover from you the sum of one hundred and sixty $\frac{12}{100}$ dollars for goods, wares, and merchandise by them sold and delivered to you at your instance and request, as fully set forth in plaintiff's complaint on file in my office.

And you are hereby notified that if you fail to appear and
137 answer the complaint, as aforesaid, judgment will be taken against you for the said sum of one hundred and sixty $\frac{12}{100}$ ($160.12) dollars, with interest from the 26th day of March, A. D. 1893, and costs of suit.

To the sheriff or any constable of said county, greeting:
Make legal service and due return hereof.
Given under my hand this 12th day of May, A. D. 1893.

A. A. YOUNG,
Justice of the Peace, County and State Aforesaid.

(Endorsed:) # 1. Justice court, county of Lincoln, State of Nevada. J. Nesbitt & Bro., plaintiffs, against H. Stevens, defendant. Affidavit of publication of summons. Filed July 10th, A. D. 1893. —— ——, justice of the peace. Filed July 10th, 1893. A. A. Young, J. P.

138 (Endorsed:) # 2. Orig. No., 1397. Nesbitt *vs.* Davidson. The within affidavit for publication of summons was read and referred to on motion for new trial of said case. G. F. Talbot, J.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for the said county of Lincoln, do hereby certify that the annexed and foregoing affidavit of publication of summons in the case of J. Nesbitt & Bro., pl'ffs, *vs.* H. Stevens, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial oft he case entitled

Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

139 In the Justice Court of Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under Firm Name of "J. Nesbitt & Bro.," Plaintiff,
v.
H. STEVENS, Defendant.

Certificate of Sale of Real Estate on Execution.

I, J. A. Denton, specially deputized by A. A. Young, justice of the peace of Pioche township, county of Lincoln, do hereby certify that by virtue of an execution in the above cause, tested the 15th day of July, 1893, by which I was commanded to make the amount of one hundred and sixty $\frac{12}{100}$ ($160.12) dollars, lawful money of the United States, to satisfy the judgment in this action, with interests thereon and costs, out of the personal property of the above H. Stevens, defendant, and if sufficient personal property could not be found, then out of the real property belonging to said defendant, on the 12th day of May, 1893, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears, I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to said plaintiffs,
140 "J. Nesbitt & Bro.," who were the highest bidder, for the sum of one hundred and nine ($109.00) dollars, lawful money, which was the whole price paid by them for the same, the real estate described as follows, to wit:

An undivided $\frac{1}{2}$ of the "Broken Hatchet" mine and mining claim; an undivided $\frac{1}{2}$ of the "Jake" mine and mining claim; an undivided $\frac{1}{2}$ of the "Fraction" mine and mining claim; an undivided $\frac{1}{2}$ of the "Daisy" mine and mining claim; an undivided $\frac{1}{2}$ of the "Double B" mine and mining claim; an undivided $\frac{1}{2}$ of the "North Star" mine and mining claim; an undivided $\frac{1}{2}$ of the "Sunset" mine and mining claim, and an undivided $\frac{1}{2}$ of the "Blue Rock" mine and mining claim.

All of said property being situate in the Ferguson mining district, in said county of Lincoln and State of Nevada.

That the price of each distinct lot and parcel was as follows: "Broken Hatchet," $35; "Jake," $25; "Fraction," $30; "Daisy," $2.50; "Double B," $2.50; "North Star," $2.50; "Sunset," $2.50, and "Blue Rock," $1.

And that the said real estate is subject to redemption in six months, pursuant to the statute in such cases made and provided.

Given under my hand this 11th day of August, 1893.

J. A. DENTON,
Special Deputy.

(Endorsed:) # 1. J. A. Denton, special deputy of Pioche
141 township, county of Lincoln, to J. Nesbitt & Bro. Certificate of sale of real estate on execution, dated August 11th, 1893. Filed in the office of the county recorder of the county of Lincoln, State of Nevada, this eighteenth day of August, 1893. H. W. Turner, county recorder, by Alex. I. Harrison, deputy.

(Endorsed:) # 2. No. 1397. J. Nesbitt, plaintiff, *vs.* W. M. Davidson, defendant. Plaintiff's exhibit marked No. 7. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. This exhibit was read and referred to on motion for new trial. G. F. Talbot, J.

142 STATE OF NEVADA, }
County of Lincoln, } *ss.*:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing certificate of sale from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 7, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

143 This indenture, made the nineteenth (19) day of February in the year of our Lord one thousand eight hundred and ninety-four between J. A. Denton, special deputy of the justice of the peace of Pioche township, county of Lincoln, State of Nevada, the party of the first part, and J. Nesbitt & Bro. partners, of the said county of Lincoln, the parties of the second part:

Witnesseth that whereas, by virtue of a writ of execution issued out of the justice court of Pioche township, county of Lincoln, and State of Nevada, tested the 15th day of July A. D. 1893, upon a judgment recovered in the said court, on the 10th day of July A. D. 1893 in favor of J. Nesbitt & Bro. aforesaid and against H. Stevens to the said special deputy directed and delivered, commanding him that, out of the personal property of said judgment debtor in his county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property of said judgment debtor on the 15th day of July A. D. 1893 or at any time afterward:

And whereas, because sufficient personal property of the said judgment debtor could not be found, whereof the said special deputy could cause to be made the moneys specified in said writ, the said special deputy did, in obedience to said command levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements, real estate and
144 premises hereinafter particularly set forth and described,

with the appurtenances, and did on the 10th day of August A. D. 1893 sell all the right, title, interest and claim of the said judgment debtor in and to the said premises at public auction at and upon each of the pieces thereof in said county of Lincoln between the hours of nine in the morning and five in the afternoon of that day, namely, at 12 o'clock m., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of the said judgment debtor in and to the said premises, were struck off and sold to the said party of the second part for the sum of one hundred and nine ($109.00) dollars, lawful money of the United States of America, the said parties of the second part being the highest bidders, and that being the highest sum bid for the same, whereupon the said special deputy, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said parties of the second part such certificate of said sale as is by law directed to be given, and a duplicate of such certificate was duly filed by said sheriff in the office of the recorder of the said county of Lincoln. And whereas, six months after said sale having expired without any redemption of the said premises having been made:

Now this indenture witnesseth, that the said J. A. Denton, the special deputy aforesaid, by virtue of the said writ and in pursuance of the statute in such cases made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and
145 confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said parties of the second part, and to their heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor H. Stevens had on the said 15th day of July, A. D. 1893, or at any time afterward, or now has, in and to all those certain lots, pieces or parcels of land, situate, lying and being in the said county of Lincoln, State of Nevada, and bounded and particularly described as follows, to wit:

An undivided one-half (½) of the "Broken Hatchet" mine and mining claim; an undivided one-eighth (⅛) of the "Jake" mine and mining claim; an undivided one-half (½) of the "Fraction" mine and mining claim; an undivided one-half (½) of the "Daisy" mine and mining claim; an undivided one-half (½) of the "Double B" mine and mining claim; an undivided one-half (½) of the "North Star" mine and mining claim; an individed one-third (⅓) of the "Sunset" mine and mining claim; and an undivided one-half (½) of the "Blue Rock" mine and mining claim; all of said mines and mining claims being situate in the Ferguson mining district in the said county of Lincoln and State of Nevada.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said parties of the second part, their heirs, and assigns forever as fully and absolutely as the said special deputy can, may, or ought to, by virtue of the said writ and of the statute in such

cases made and provided, grant, bargain, sell, convey and confirm the same.

146 In witness whereof the said special deputy, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

J. A. DENTON, [SEAL.]
Special Deputy of the Justice of the Peace of Pioche Township, Lincoln County, State of Nevada.

Signed, sealed, and delivered in the presence of—
——— ———.

STATE OF NEVADA, } ss:
County of Lincoln, }

On this 19th day of February, A. D. one thousand eight hundred and ninety-four, before me, A. A. Young, a justice of the peace in and for said Lincoln county, duly commissioned and sworn, personally appeared the within-named J. A. Denton, special deputy of the justice of the peace of Pioche township, county of Lincoln, State of Nevada, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand the day and year in this certificate first above written.

A. A. YOUNG,
Justice of the Peace of Pioche Township, County of Lincoln, State of Nevada.

147 (Endorsed:) # 1. J. A. Denton, special deputy, to J. Nesbitt & Bro. Deed. Dated Feb. 19th, 1894. Recorded, at the request of J. Nesbitt, Sept. 14th, A. D. 1896, at 30 minutes past 11 a. m., in Book "Q" of M'g *of* Deeds, page- 510, 511, 512, 513, and 514, Lincoln county, Nev., records. John Shier, Co. recorder.

(Endorsed:) # 2. No. 1397. Plaintiff's exhibit marked No. 4. Filed June 2nd, 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. This deed was read and referred to on the motion for a new trial of said action. G. F. Talbot, J.

148 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing deed from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 4, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

149 Justice Court, Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of J. Nesbitt & Bro., Plaintiffs,
vs.
W. L. DE BEQUE, Defendant.

Plaintiffs complain of defendant, and for cause of action allege: That heretofore, to wit, on the 26th day of March, A. D. 1893, the said defendant, at said county of Lincoln, became and was indebted to said plaintiffs in the sum of two hundred and twelve $\frac{14}{100}$ dollars for goods, wares, and merchandise theretofore sold and delivered and money theretofore loaned and advanced by said plaintiffs to said defendant at his special instance and request, and that no part thereof has been paid.

Wherefore said plaintiffs ask judgment against said defendant for said sum of two hundred and twelve $\frac{14}{100}$ ($212.14) dollars, with interest thereon from the 26th day of March, A. D. 1893, and costs of this action.

GEO. S. SAWYER,
Att'y for Plaintiffs.

150 STATE OF NEVADA, } ss:
County of Lincoln, }

James Nesbitt, being duly sworn, on oath says that he is one of the plaintiffs in the above entitled action, and that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

JAMES NESBITT.

Subscribed and sworn to before me this 12th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

(Endorsed:) # 1. No. 1397. Justice court, Pioche township, county of Lincoln. J. Nesbitt & Bro. *vs.* W. L. De Beque. Complaint. Filed May 12th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. This complaint was read and referred to on the hearing of the notice of motion for a new trial of said case. G. F. Talbot, J. Geo. S. Sawyer, att'y for pl'ts.

151 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for the said county of Lincoln, do hereby certify that the annexed and fore-

going complaint is the case of J. Nesbitt &|Bro. *vs.* W. L. De Beque, in the justice court, Pioche township, Lincoln county, Nevada, is the original document or paper introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

152 *Justice's Court Summons.*

STATE OF NEVADA, } ss:
County of Lincoln, }

In Justice's Court, Pioche Township.

JAMES NESBITT and GEORGE NESBITT, Partners under Firm Name of "J. Nesbitt & Bro.," Plaintiffs,
against
W. L. DE BEQUE, Defendant.

The State of Nevada to W. L. De Beque, defendant:

You are hereby summoned to appear before me, a justice of the peace in and for Pioche township, county and State aforesaid, at my office, in Pioche, on the 10th day of July, A. D. 1893, at 10 o'clock a. m. of that day, to answer the complaint of J. Nesbitt & Bro., wherein they claim to recover from you the sum of two hundred and twelve $\frac{14}{100}$ ($212.14) dollars for goods, wares, and merchandise sold and delivered and money loaned and advanced to you by them at your instance and request, as fully set forth in plaintiffs' complaint on file in my office.

And you are hereby notified that if you fail to appear and answer the complaint, as aforesaid, judgment will be taken against you for the said sum of two hundred and twelve $\frac{14}{100}$ dollars, with interest thereon from the 26th day of March, A. D. 1893, and costs of suit.

153 To the sheriff or any constable of said county, greeting:
Make legal service and due return hereof.

Given under my hand this 12th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*,
Justice of the Peace, County and State Aforesaid.

Attest: A true copy of the original summons.

(Endorsed:) #1. No. 1397, original. Justice court summons. Pioche township, Lincoln county, State of Nevada. J. Nesbitt & Bro. *vs.* W. L. De Beque. Nesbitt *vs.* Davidson. This summons was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

154 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing summons in the case of J. Nesbitt & Bro. *vs.* W. L. De Beque, in the justice court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

155 In the Justice's Court of Pioche Township, in the County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under Firm Name of J. Nesbitt & Bro., Plaintiffs,
v.
W. L. DE BEQUE, Defendant.
} Writ of Attachment. Demand, $212.14.

The State of Nevada to the sheriff or any constable of the said county of Lincoln, Greeting:

You are hereby commanded to attach and safely keep all the property of the above-named defendant in this Lincoln county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, to wit, two hundred and twelve $\frac{14}{100}$ ($212.14) dollars, besides the costs, unless the said defendant shall give you security by the undertaking of two sufficient securities in an amount sufficient to satisfy said demand, besides costs, in which case you will take such undertaking.

Make due return hereof.

Given under my hand at said township the 12th day of May, 1893.

A. A. YOUNG,
Justice of the Peace of said Township.

156 I hereby deputize J. A. Denton to serve and execute the above writ of attachment.

A. A. YOUNG, *J. P.*

(Endorsed.)

1.

Justice's Court of —— Township.

To —— ——:

By virtue of an attachment issued out of the justice's court

of —— township, in the — county of ——, and to me directed, against the within-named defendant, I attach all moneys, effects, and credits in your hands or under your control belonging to said defendant, or so much thereof as will satisfy said plaintiff's claim, to wit, — dollars, with costs and accruing costs. Please furnish statement.

Witness my hand this — day — ——, 188–.

—— ——, *Constable.*

(Endorsed) # 2. No. 1397. Justice's court, Pioche township, county of Lincoln. J. Nesbitt & Bro., plaintiff, *v.* W. L. De Beque, defendant. Writ of attachment. Filed May 22nd, 1893. A. A. Young, justice of the peace of said township.

157 (Endorsed.)

3.

I hereby certify that I received the within writ on the 12th day of May, A. D. 1893, and duly executed the same by levying upon the following-described property belonging to said defendant, situate in Ferguson mining district, county of Lincoln, State of Nevada, to wit: ¼ of the "Broken Hatchet" mine, ¼ of the "Blue Rock" mine, ¼ of the "Daisy" mine, ¼ of the "Fraction" mine, ¼ of the "Double B" mine, ½ of the "North Star" mine, ⅓ of the "Sunset" mine, ⅛ of the "Jake" mine, ⅛ of the "Zip Coon" mine, and one log cabin.

J. A. DENTON,
Special Deputy.

Dated May 22nd, 1893.

Justice Court, Pioche Township, County of Lincoln, State of Nevada.

J. Nesbitt & Bro., Plaintiffs,
vs.
W. L. De Beque, Defendant.

State of Nevada, } ss:
County of Lincoln, }

158 James Nesbitt, being duly sworn, on oath says that he is one of the plaintiffs in the above-entitled action.

That said defendant has departed from said State of Nevada and cannot, after due diligence, be found therein, and that service of summons upon him in said action cannot be made except by a publication thereof.

Wherefore said affiant asks that an order be made by the justice of said court that the service of the summons in said action be made by the publication thereof.

J. NESBITT.

Subscribed and sworn to before me this 13th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

(Endorsed:) # 1. Justice court, Pioche township, county of Lincoln. J. Nesbitt & Bro. *vs.* W. L. De Beque. Affidavit for publication of summons. Filed May 13th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. This affidavit was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

159 STATE OF NEVADA, } *ss.*:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing "affidavit for publication of summons," in the case of J. Nesbitt & Bro. *vs.* W. L De Beque, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,

[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

160 Justice Court, Pioche Township, County of Lincoln, State of Nevada.

J. NESBITT & BRO., Plaintiffs,
vs.
W. L. DE BEQUE, Defendant.

Upon the reading and filing of the affidavit of James Nesbitt, one of the plaintiffs in the above-entitled action, and it appearing therefrom that the said defendant has departed from the said State of Nevada, and cannot after due diligence be found therein, and that personal service of summons in said action cannot be made upon him, and it also appearing from the complaint in said action, duly verified, that a cause of action exists against said defendant—

It is therefore ordered that the service of the summons in said action be made by the publication thereof for six successive weeks in the Weekly "Lode," a newspaper published at Pioche, in said county.

Witness my hand the 13th day of May, A. D. 1893.

A. A. YOUNG, *J. P.*

(Endorsed:) # 1. Justice court, Pioche township, county of Lincoln. J. Nesbitt & Bro. *vs.* W. L. De Beque. Order of
161 publication of summons. Filed May 13th, 1893. A. A. Young, J. P. Nesbitt *vs.* Davidson. The within order for publication of summons was read and referred to on the hearing of the motion for new trial in said case. G. F. Talbot, J.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing order for publication of summons in the case of J. Nesbitt & Bro. *vs.* W. L. De Beque, in the justice's court of Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

162 In the Justice Court of Pioche Township in and for the County of Lincoln, State of Nevada.

J. NESBITT & BRO., Plaintiffs, } Affidavit of Publication of Summons.
against
W. L. DE BEQUE, Defendant. }

STATE OF NEVADA, } ss:
County of Lincoln, }

N. P. Dooley, of said county, being duly sworn, says that he is a white mail citizen of the United States, over twenty-one years of age, and is competent to be a witness on the trial of the above-entitled action; that he is the proprietor of the Lode, a newspaper printed and published in the said county; that the summons of which the annexed is a printed copy was published in said newspaper at least six consecutive weeks, commencing on the 20th day of May, A. D. 1893, and ending on the 8th day of July, A. D. 1893.

N. P. DOOLEY,
Proprietor and Publisher.

Subscribed and sworn to before me this 10th day of July, A. D. 1893.

A. A. YOUNG, *J. P.*

163 *Justice's Court Summons.*

STATE OF NEVADA, } ss:
County of Lincoln, }

In the Justice's Court, Pioche Township.

JAMES NESBITT and GEORGE NESBITT, Partners under the Firm Name of "J. Nesbitt & Bro.," Plaintiffs,
against
W. L. DE BEQUE, Defendant.

The State of Nevada to W. L. De Beque, defendant:

You are hereby summoned to appear before me, a justice of the

peace in and for Pioche township, county and State aforesaid, at my office, in Pioche, on the 10th day of July, A. D. 1893, at 10 o'clock a. m. of that day, to answer the complaint of J. Nesbitt & Bro., wherein they claim to recover from you the sum of two hundred and twelve $\frac{14}{100}$ ($212.14) dollars for goods, wares, and merchandise sold and delivered and money loaned and advanced to you by them at your instance and request, as fully set forth in plaintiffs' complaint on file in my office.

And you are hereby notified that if you fail to appear and answer the complaint, as aforesaid, judgment will be taken
164 against you for the said sum of two hundred and twelve $\frac{14}{100}$ dollars, with interest thereon from the 26th day of March, A. D. 1893, and costs of suit.

To the sheriff or any constable of said county, greeting.

Make legal service and due return hereof.

Given under my hand this 12th day of May, A. D. 1893.

A. A. YOUNG,
Justice of the Peace, County and State Aforesaid.

(Endorsed:) # 1. Orig., No. 1397. Justice court, county of Lincoln, State of Nevada. J. Nesbitt & Bro., plaintiffs, against W. L. De Beque, defendant. Affidavit of publication of summons. Filed July 10th, A. D. 1893. —— ——, justice of the peace.

(Endorsed:) # 2. Nesbitt *vs.* Davidson. The within affi-
165 davit for publication of summons was read and referred to on motion for new trial of said case. G. F. Talbot, J.

STATE OF NEVADA, }
County of Lincoln, } *ss:*

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing "affidavit of publication of summons" in the case of J. Nesbitt & Bro. *vs.* W. L. De Beque, in the justice's court, Pioche township, Lincoln county, Nevada, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

166 In the Justice Court, Pioche Township, County of Lincoln, State of Nevada.

JAMES NESBITT and GEORGE NESBITT, Partners under Firm Name of "J. Nesbitt & Bro.," Plaintiffs,
vs.
W. L. DE BEQUE, Defendant.
} Certificate of Sale of Real Estate on Execution.

I, J. A. Denton, specially deputized by A. A. Young, justice of

the peace of Pioche township, county of Lincoln, do hereby certify that by virtue of an execution in the above cause, tested the 15th day of July, 1893, by which I was commanded to make the amount of two hundred and twelve $\frac{14}{100}$ ($212.14) dollars, legal money of the United States, to satisfy the judgment in this action, with interest thereon, and costs, out of the personal property of the above W. L. De Beque, defendant, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the 12th day of May, A. D. 1893, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears, I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to said plaintiffs, "J. Nesbitt & Bro," who were the highest bidders, for the sum of two hundred and twenty (220) dollars, lawful money, which was the whole price paid by them for the same, the real
167 estate described as follows, to wit:

An undivided $\frac{1}{8}$ of the "Jake" mine and mining claim, an undivided $\frac{1}{4}$ of the "Broken Hatchet" mine and mining claim, an undivided $\frac{1}{2}$ of the "Fraction" mine and mining claim, an undivided $\frac{1}{8}$ of the "Zip Coon" mine and mining claim, interest in one cabin, an undivided $\frac{1}{4}$ of the "Daisy" mine and mining claim, an undivided $\frac{1}{4}$ of the "Double B" mine and mining claim, an undivided $\frac{1}{2}$ of the "North Star" mine and mining claim, and an undivided $\frac{1}{3}$ of the "Sunset" mine and mining claim—

All situate in the Ferguson mining district, in said county of Lincoln and State of Nevada.

That the price of each distinct lot and parcel was as follows:

"Jake," $25; "Broken Hatchet," $35; "Fraction," $30; "Zip Coon," $75; cabin, $25; "Daisy," $5; "Double B," $5; "North Star," $10; "Sunset," $10.

And that the said real estate is subject to redemption in six months pursuant to the statute in such cases made and provided.

Given under my hand this 11th day of August, 1893.

J. A. DENTON,
Special Deputy.

(Endorsed:) #1. J. A. Denton, special deputy, Pioche township, county of Lincoln, to J. Nesbitt & Bro. Certificate of sale of real estate on execution. Dated Aug. 11th, 1893. Filed in the
168 office of the county recorder of the county of Lincoln, State of Nevada, this eighteenth day of August, 1893. H. W. Turner, county recorder, by Alex. I. Harrison, deputy.

(Endorsed:) #2. Orig., No. 1397. Plaintiff's Exhibit marked No. 5. Filed June 2nd, 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. This exhibit was read and referred to on motion for a new trial of said case. G. F. Talbot, J.

169 STATE OF NEVADA, }
County of Lincoln, } ss:

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county

of Lincoln, do hereby certify that the annexed and foregoing certificate of sale from J. A. Denton, special constable, filed as Plaintiff's Exhibit No. 5, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,

[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

170 This indenture, made the nineteenth (19th) day of February, A. D. 1894, between J. A. Denton, special deputy of the justice of the peace, Pioche township, county of Lincoln, State of Nevada of the first part, and J. Nesbitt & Bro., partners, of the said county of Lincoln and State of Nevada, of the second part:

Witnesseth that whereas, by virtue of a writ of execution, issued out of, and under the seal of the justice court of the Pioche township, county of Lincoln, State of Nevada, in and for said Lincoln county, tested the 15th day of July A. D. 1893 upon a judgment recovered in said court on the 10th day of July A. D. 1893, in favor of J. Nesbitt & Bro. and against W. L. De Beque to the said constable directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made of the lands, tenements and real property belonging to him, on the 15th day of July A. D. 1893, or at any time afterwards: And whereas because sufficient personal property of the said judgment debtor could not be found, whereof he, the said special deputy could cause to be made the moneys specified in said writ, he, the said special deputy, did, in obedience to the command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor so had of, in and to the lands, tenements, real estate and premises, hereinafter particularly set forth and described, with the appurtenances, and did, on the 10th day of August A. D. 1893,

171 sell the said premises, at public vendue, at and upon each separate piece and parcel thereof in the said Lincoln county, between the hours of nine in the morning and five in the afternoon of that day, namely at 12 o'clock m., after having first given notice of the time and place of such sale by advertising the same according to law: at which sale the said premises were struck off and sold to the said J. Nesbitt & Bro. for the sum of two hundred and twenty ($220) dollars, lawful money, they the said J. Nesbit & Bro. being the highest bidders and that being the highest sum bidden, and the whole price paid for the same; and whereas the said special deputy, after receiving from said purchaser the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the county of Lincoln a duplicate of such certificate; and whereas, six months

after such sale have expired without any redemption of the said premises having been made,

Now this indenture witnesseth, that J. A. Denton, the special deputy aforesaid, and party hereto of the first part, by virtue of said writ, and in pursuance of the statute in such cases made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid as aforesaid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said J. Nesbitt & Bro. their heirs and assigns, all the estate, right, title and interest of the said W. L. De Beque, which he had on the said 15th day of July A. D. 1893, or at any time afterwards, or
172 now has of, in and to all the following-described premises, viz:

An undivided one-eighth (⅛) of the "Jake" mine and mining claim; an undivided one-fourth (¼) of the "Broken Hatchet" mine and mining claim; an undivided one-half (½) of the "Fraction" mine and mining claim; an undivided one-eighth (⅛) of the "Zip Coon" mine and mining claim; an undivided one fourth (¼) of the "Daisy" mine and mining claim; an undivided one-fourth (¼) of the "Double B" mine and mining claim; an undivided one-half (½) of the "North Star" mine and mining claim; and an undivided one-third (⅓) of the "Sunset" mine and mining claim. All of which said mines and mining claims are situate in the Ferguson mining district in said county of Lincoln and State of Nevada, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the said above mentioned and described premises with the appurtenances, unto the said J. Nesbitt & Bro., their heirs and assigns forever, as fully and absolutely as he, the special deputy aforesaid, can, may, or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof the said special deputy, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

J. A. DENTON. [SEAL.]

Signed, sealed and delivered in the presence of—

—— ——.

173 STATE OF NEVADA, } *ss*:
County of Lincoln, }

On this 19th day of February, A. D. 1894, before me, A. A. Young, a justice of the peace in and for Lincoln county, duly elected and qualified, personally appeared the within-named J. A. Denton, special deputy of the justice of the peace of Pioche township, in said county, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the individual described in and who executed the foregoing instrument, and acknowledged

to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand the day and year in this certificate first above written.

A. A. YOUNG,
Justice of the Peace of Pioche Township,
County of Lincoln, State of Nevada.

(Endorsed:) #1. Deed. J. A. Denton, special deputy, etc., to J. Nesbitt & Bro. Dated Feb. 19th, 1894. Recorded at request of J. Nesbitt Sept. 14th, A. D. 1896, at 30 min. past 11 a. m., in Book "Q" of M'g Deeds, Lincoln county, Nevada; recorded at pages 514, 515, 516, 517, 518. John Shier, Co. recorder.

174 (Endorsed:) #2. Orig. No., 1397. Plaintiffs' exhibit marked No. 6. Filed June 2nd, 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. This deed was read and referred to on the hearing of the motion for a new trial of said action. G. F. Talbot, J.

STATE OF NEVADA,
County of Lincoln, } *ss:*

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing deed from J. A. Denton, special constable, filed as Plaintiffs' Exhibit No. 6, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.] H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

175 *Notice.*

To all whom it may concern:

Notice is hereby given that the undersigned, owners of the follow- described mining claims, situated in Ferguson mining district, Lincoln county, State of Nevada, being desirous of taking the benefit of the act of Congress entitled An act to amend section 2324 of the Revised Statutes of the United States relating to mining claims, approved Nov. 3rd, 1893, hereby declare that we in ging faith intend to hold and work said claims.

Witness our hands this 26th day of December, A. D. 1893.

The Double B mine.
" North Star "
" Rescue "
" Sunset "
The Union mine.
Eureka "
Annie May "
The Corbet "
Broken Hatchet "
Fraction "
Alligator "

JAMES NESBITT,
GEORGE NESBITT,
Claimants.

Recorded at request of G. Nesbitt December 27, A. D. 1893.
H. W. TURNER, *Co. Recorder*,
By ALEX. I. HARRISON, *Deputy*.

176 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. W. Turner, county recorder in and for the county of Lincoln, State of Nevada, do hereby certify the foregoing to be a true, full, and correct copy of the notice of the intention of the "Fraction" mining claim, situate in Ferguson mining district, Lincoln county, Nevada, as the same appears of record in my office in Book "E" of M'g Notices, page 358.

Witness my hand and official seal this 31st day of May, A. D. 1897.

[SEAL.] H. W. TURNER,
County Recorder.

(Endorsed:) #1. Orig. No., 1397. J. Nesbitt, pl't'f, *vs.* Wm. Davidson, defd. Plaintiff's exhibit marked No. 3. Filed June
177 2nd, 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson.
The within notice was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing certified copy of notice in lieu of assessment-work for 1893, filed as Plaintiff's Exhibit No. 3, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

178 *Notice.*

Notice is hereby given that the undersigned, owners of the Eureka, Annie May, Alligator, Rhe Union, P. Wabeck, Fraction, Sunset, Broken Hatchet, Short, silver mining claims, situated in Ferguson mining district, Lincoln county, State of Nevada, being desirous of taking the benefit of the act of Congress entitled An act to amend section 2324 of the Revised Statutes of the United States, relating to mining claims, approved July 18, 1894, hereby declare that they in good faith intend to hold and work said claims.

Witness our hand this 22nd day of Dec., A. D. 1894.

JAMES NESBITT.
GEORGE NESBITT.

Recorded, at request of James Nesbitt, December 27th, 1894.
H. W. TURNER, *Co. Recorder*,
By ALEX. I. HARRISON, *Deputy*.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. W. Turner, county recorder in and for the county of Lincoln, State of Nevada, do hereby certify the foregoing to be a true, full, and correct copy of the notice of intention of the Fraction mining claim, situate in Ferguson mining district, Lincoln Co., State of Nevada, as the same appears of record in my office in Book "F" of Mining Notices, page 281.

179 Witness my hand and official seal this 31st day of May, A. D. 1897.

[SEAL.]

H. W. TURNER,
County Recorder.

(Endorsed:) #1. Nesbitt, pl't'f, *vs.* Davidson, defd. Plaintiff's Exhibit marked No. 2. Filed June 2nd, 1897. H. J. Goodrich, clerk. Nesbitt *vs.* Davidson. The within notice was read and referred to on the hearing of the motion for a new trial of said case. G. F. Talbot, J.

180 STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing certified copy of notice in lieu of assessment work for 1894, filed as Plaintiff's Exhibit No. 2, is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson, in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

[SEAL.]

H. J. GOODRICH,
County Clerk and ex Officio Clerk of said Court.

181 *Notice of Location.*

To all whom it may concern:

Notice is hereby given that the undersigned, having complied with the requirements of chapter VI of title 32 of the Revised Statutes of the United States and the local mining laws, rules, and regulations, have located and claim one thousand linear feet on this lead (1,000 linear feet on the lode, — acres of placer mining ground), lode, or ledge mineral deposit, situated in Ferguson mining district, county of Lincoln and State of Nevada, and described as follows(*a*): Beginning at this monument or point of discovery and running five hundred feet in a northerly direction and five hundred feet in a southerly direction, with three hundred feet on each side for work-

ing purposes, bounded north by Summit mine and on the south by Cliff mine and on the east by Lookout and on the west by Monitor mine. This mine shall be known as the Sleeper.

Discovered January 1st, 1895.

Located January 1st, 1895.

Locators: { JAMES MURPHY, WM. DAVIDSON.

(Endorsed:) # 1. The within notice of location was read and referred to on hearing of motion for a new trial in Nesbitt *vs.* Davidson. G. F. Talbot, J.

182 (*a.*) The claim should be as accurately described as possible with reference to some natural object or permanent monument and marked by stakes or stones, as required by the local law. If a placer claim is located on surveyed land, the legal subdivision taken should be described to the public surveys. Record of location notices in absence of a district recorder should be made with the recorder of deeds for the county wherein the claim is situated.

(*b.*) Though not necessary, it is well to have these location notices attested by two witnesses.

In relocations to increase width of surface of ground under the local law or to more particularly identify or describe the claim, use this form, but state after the description that it is a relocation, and, in addition, where the former location is recorded, in order that the title may relate back to the original discovery.

In locations of abandoned mines the fact of prior abandonment is not now an important feature and need not be stated in the location notice. The value of improvements left upon abandoned mines cannot be counted in by the subsequent locators.

(*c.*) Where the location is made by an agent the agent should sign his principal's name as locator, and his own name on the line below, as indicated.

Filed for record, at request of James Murphy, January 1st, A. D. 1895, at 2 p. m.

Recorded in Book A, in page 353, records of Ferguson mining district, Lincoln county, Nevada.

W. D. MAYNARD, *Recorder.*

183 (Endorsed:) # 2. Defendant's Exhibit marked B. Filed June 3rd, 1897. H. J. Goodrich, clerk. Mining location. Sleeper mine, located by James Murphy, Wm. Davidson, January 1st, 1895. Received for record Jan. 8th, 1895, at 2.15 p. m., and recorded in Book F, Mining Notices, page 334, Lincoln county records, Nev., at the request of Wm. Davidson. John Shier, county recorder.

STATE OF NEVADA, } *ss.*:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county of Lincoln, do hereby certify that the annexed and foregoing notice

of location of the Sleeper mine, filed as Defendant's Exhibit "B," is the original document or paper which was introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* W. M. Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

184 *Notice of Location.*

Fraction.

Notice is hereby given that the undersigned has this day claimed and located (500) five hundred linear feet on the line of this lode of mineral-bearing rock, with 300 feet on each side, for mining purposes, described as running westerly (300) three hundred feet and easterly (200) two hundred feet, and is situated between the Monitor and Lookout mine and adjoins the same. This mine is situated in the Ferguson mining district, in Lincoln Co., Nevada, and shall be known as the Fraction mine, and is located May 15th, 1892.

Located by W. DE BECK, ¼ interest.
H. STEEVENS, ½ interest.
A. BORTH, ¼ interest.

Recorded at request of H. Steevens June 9, 1892, at 9.30 a. m.
H. W. TURNER, *Co. Recorder*,
By ALEX. I. HARRISON, *Deputy*.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. W. Turner, county recorder in and for the county of Lincoln, State of Nevada, do hereby certify the foregoing to be a true, full, and correct copy of the notice of location of the "Fraction" mining claim, situate in Ferguson mining district, Lincoln Co., State of Nevada, as the same appears of record in my office in Book "D" of M'g Notices, page 304.

185 Witness my hand and official seal this 31st day of May, A. D. 1897.

H. W. TURNER,
County Recorder.

(Endorsed:) # 1. Orig., No. 1397. Nesbitt, pl't'f, *vs.* Davidson, def't. Plaintiff's Exhibit marked No. 1. Filed June 2nd, 1897. H. J. Goodrich, clerk. The within notice of location was read and referred to on motion for new trial of said action. G. F. Talbot, J.

STATE OF NEVADA, } ss:
County of Lincoln, }

I, H. J. Goodrich, county clerk and *ex officio* clerk of the fourth judicial district court of the State of Nevada in and for said county

of Lincoln, do hereby certify that the annexed and foregoing certified copy of notice of location of Fraction mine, filed as Plaintiff's Exhibit No. 1, is the original document or paper which was
186 introduced in evidence or used on the trial of the case entitled Nesbitt *vs.* Davidson in said court, and the same was referred to on the hearing of the motion for a new trial in said case.

Witness my hand and the seal of said court this 12th day of February, A. D. 1898.

H. J. GOODRICH,
[SEAL.] *County Clerk and ex Officio Clerk of said Court.*

187 *Supreme Court Decision.*

In the Supreme Court of the State of Nevada.

JAMES NESBITT, Respondent,
vs.
THE DE LAMAR'S NEVADA GOLD MINING COMPANY (a Corporation), Appellants. } (No. 1529.)

Appeal from the district court in and for Lincoln county, Nevada. Hon. G. F. Talbot, judge.

George S. Sawyer for respondent.
Henry Rives and T. J. Osborne for appellants.

Opinion.

By BONNIFIELD, *J.*:

W. M. Davidson filed his application in the U. S. land office at Carson City for a patent to the Sleeper mine, situated in Ferguson mining district, Lincoln county, and the plaintiff filed in said office a protest against the issuance of such patent and an adverse claim to that portion of the Sleeper mine embraced within the
188 boundaries of the Fraction mine, claiming said Fraction mine for himself and his alleged co-owners, George Nesbitt and A. Borth, as tenants in common.

This action was brought by the plaintiff against said W. M. Davidson, pursuant to section 2325 of the Revised Statutes of the United States and section 1900 of the General Statutes of Nevada, to determine the right of possession to the Fraction mine.

The case was tried before the district court in and for said county without a jury. A judgment was given in favor of said plaintiff and his cotenants. A notice of motion for new trial was given and statement on motion made by W. M. Davidson, the defendant. Before said motion was heard De Lamar's Nevada Gold Mining Company was substituted for said Davidson as defendant. The motion was denied. This appeal is taken from the judgment and from the order denying a new trial.

The notice of motion for new trial designates as grounds thereof, first, insufficiency of the evidence to justify the judgment, and that the judgment is against law; second, errors in law occurring at the

trial and excepted to by the defendant. The court made no express findings. One of the specifications of error is that the judgment is not supported by the evidence. The inquiry, then, is presented: Is there substantial evidence to support the judgment?

The evidence shows that W. De Beck, H. Stevens, and A. Borth located the Fraction mine on the 12th day of May, 1892, and that they performed all the acts required to make a valid location; that the Nesbitt Bros. and A. Borth did assessment-work in each of the years 1895, 1896, and 1897 to the full amount required by
189 law; that the Sleeper mine was located on the first day of January, 1895, and the boundaries thereof take in the Fraction mine; that no work was done on the Fraction mine in either of the years 1893 and 1894, but that the Nesbitt Bros. in December of each of said years had a notice recorded in the county recorder's office, where the original notice of the location of the Fraction mine was filed, declaring their intention in good faith to hold and work said mine.

The plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title, interest, and claim of said W. De Beck and H. Stevens in and to the Fraction mine, and that they and A. Borth were the owners of said mine as tenants in common. In support of this claim he offered in evidence a judgment recovered by the Nesbitt Bros. against said W. De Beck for $212.00 in the justice's court of Pioche township, in Lincoln county, and a judgment recovered by them against said H. Stevens on the same day and in the same court for $160.00, together with all the records, papers, and proceedings of said court in said cases; to the introduction of which counsel for defendant objected on several different grounds, and the court excluded them on the ground, in effect, that the record showed that the justice's court had not acquired jurisdiction over either defendant in either of said cases.

It appears that on the 15th day of July, 1893, the justice's court issued an execution on each of said judgments and specially deputed A. J. Denton, pursuant to the provisions of sec. 571 of the civil practice act, to serve the same; that on the 11th day of August next following said special officer sold to the Nesbitt Bros. all the right, title, and interest of said De Beck and Stevens respect-
190 ively in and to the Fraction mine under and in pursuance of the commands of said executions; that on said last date said officer executed to the Nesbitt Bros. a certificate of said sales respectively and filed a duplicate copy thereof in the office of the county recorder on the 19th day of August, 1893; that on the 19th day of February, 1894, said officer executed to the Nesbitt Bros. deeds of conveyance of the said interest of De Beck and Stevens respectively in said mine, no redemption having been made. The certificate and deeds were admitted in evidence against the objections of the defendant, but for the purpose only of showing or as "tending to show color of title and adverse possession."

Counsel for appellant contends and his theory is, in effect, that said judgments being void the certificates of sale and the deeds executed to the Nesbitt Bros. are void and do not tend to show color

of title or adverse possession to said Fraction mine; that all acts done by the Nesbitt Bros. with reference to said mine are nugatory and can avail the plaintiff nothing in this action; that they acquired no right to file said notice in 1893, nor in 1894, because the certificates of sale gave no right of entry upon the Fraction mine, and that said deeds gave no right to such entry; that the original locators of the Fraction mine having failed to perform the required annual labor for the years 1893 and 1894 and having failed to file any notice of intention to hold and work the mine, as required by the acts of Congress in that respect, and the Nesbitt Bros. not having taken actual possession until the fall of 1895, the mine had been forfeited and was subject to relocation when the defendant and James Murphy located the Sleeper mine.

191 The vital question in this case is whether the said notices the Nesbitt Bros. caused to be recorded of their intention to hold and work said mine had the legal effect of saving the mine from being subject to relocation for any period of time? In determining this question it is not necessary to consider what legal value said certificates of sale and deeds may have, if any, except as evidence tending to show the good faith of the Nesbitt Bros. and their co-claimant, A. Borth, in all that they did with reference to said mine.

The evidence discloses that from the date of said sales A. Borth regarded the Nesbitt Bros. as having acquired all the interests of De Beck and Stevens in said mine, and that the Nesbitt Bros. and A. Borth mutually recognized each other as co-owners of said mining claim as tenants in common; that upon consultation and agreement between them, and at the request of A. Borth, the Nesbitt Bros. had said notices recorded in lieu of performing the annual labor; that said notices were recorded for the benefit of all three and to represent said mine; that in all things done in the premises all of said claimants acted in good faith and in the belief that the Nesbitt Bros. acquired all the right, title, and interest of De Beck and Stevens in and to said mine by virtue of said judgments and sales made thereunder.

If the Nesbitt Bros., at the instance of A. Borth and in pursuance of an agreement between them and him, had in good faith performed one hundred dollars' worth of labor or improvements on said mine in 1893 and 1894, pursuant to the provisions of section 2324, U. S. Revised Statutes, certainly the mine would not have been sub-

192 ject to relocation on the first day of January, 1895, although it might turn out on judicial investigation that the Nesbitt Bros. had no legal or equitable title to any interest therein. Such labor would have represented the mine and defeated any relocation made in 1895. It is true that work done by a mere trespasser or stranger to the title will not inure to the benefit of the locator. Little Gunnel M. Co. *vs.* Kamber, 1 Morr. Min. Rep., 536.

But when the mine is represented by an owner and annual work performed by or at the instance of the owner or some one in privity with him, it is sufficient. (2 Lindley on Mines, sec. 633.)

Evidently it was the intention of Congress, in passing the special

acts of 1893 and 1894, suspending the requirements of section 2324 of the Revised Statutes as to the annual labor on mining claims, that the recording of the prescribed notice should have the same legal effect as performing the labor.

The act of 1893 provides * * * "that no mining claim which has been regularly located and recorded, as required by the local laws and mining regulations, shall be subject to forfeiture for non-performance of the annual assessment-work for the year eighteen hundred and ninety-three: Provided, that the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate was filed, on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they in good faith intend to hold and work said claim." The act of 1894 was the same in terms as the act of 1893, except the year of 1894 was substituted for the year 1893.

193 The Fraction mine being represented by one of the locators, A. Borth, and said Nesbitt Bros. having had said notices recorded, in pursuance of said agreement and at the instance of said Borth as well as of themselves, and under the honest belief of all three that the Nesbitt Bros. had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper mine was made, and therefore that the location of the Sleeper mine was and is invalid in so far as it covers the Fraction mining claim.

The contention of counsel that in the sense of said statutes of 1893 and 1894 "the claimant or claimants" authorized to secure the benefits of said acts must have a valid claim to the mining ground claimed is not, in our opinion, tenable. In case of conflicting locations of the same mining claims, the respective claimants are both required to perform the annual labor, and in 1893 and 1894 they were both required to do the required assessment-work or cause the prescribed notice to be recorded in lieu thereof, yet in no such case could both have a valid claim to the same mine.

Counsel contends that the judgment is against law, in that it quiets the title in the plaintiff, which title they allege "never existed, and which title, if it exists at all, is still in De Beck and Stevens, and with which title the plaintiff has shown neither a legal nor an equitable connection, and neither of them (De Beck and Stevens) being parties to this action, that title cannot be affected by this action, nor can it be quieted in a party who is a stranger

194 to it, and especially it cannot be quieted in favor of such stranger as against a *bona fide* prior occupant claiming under color of title superior to that set up by the plaintiff."

The answer to this contention is that the title to the Fraction mine was quieted in the plaintiff and his said co-claimants, one of whom is A. Borth, one of the original locators; that, as we think we have shown, said mine has not been subject to forfeiture, and hence the defendant's relocation is invalid; that if the Nesbitt Bros.

have no valid title to De Beck and Stevens' interest, and have not otherwise a valid interest in said mine, A. Borth has the exclusive right of possession as against them, as well as against the defendants, and the invalidity of the claim of the Nesbitt Bros. could not avail the defendant or make valid or strengthen his claim, nor could it invalidate or impair the validity of the claim of A. Borth. Any question that may exist, if any, between any of the locators of the Fraction mine and the Nesbitt Bros. as to the rights of the latter claimants with reference to said mine is a matter solely of their own concern, and not a matter in which the defendant has any legal interest.

We are of opinion that the evidence is sufficient to support said judgment and that said judgment is not against law. The judgment and order appealed from are therefore affirmed.

We concur:
BELKNAP, *C. J.*
MASSEY, *J.*

Filed March 30, 1898.

EUGENE HOWELL,
Secretary of State and ex Officio Clerk of the Supreme Court.

195 JAMES NESBITT, Respondent,
vs.
THE DE LAMAR'S NEVADA GOLD MINING COMPANY (a Corporation), Appellants. } No. 1529.

Appeal from the district court in and for Lincoln county, Nevada.

The above-entitled cause came regularly on to be heard at a former day, when counsel for the respective parties appeared and were severally heard in oral argument, and thereupon the same was duly submitted and taken under advisement by the court.

And now, upon this day, all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Bonnifield, J., concurred in by Belknap, C. J., and Massey, J., to the effect that the judgment of the lower court is affirmed.

Whereupon it is now ordered, adjudged, and decreed by the court that the judgment and order of the district court of the State of Nevada in and for Lincoln county in the above-entitled cause be, and the same is hereby, affirmed with costs.

Judgment rendered March 30, 1898.

196 *Supreme Court Decision.*

In the Supreme Court of the State of Nevada.

JAMES NESBITT, Respondent,
vs.
THE DE LAMAR'S NEVADA GOLD MINING COMPANY (a Corporation), Appellants. } (No. 1529.)

Appeal from the district court in and for Lincoln county—Hon. G. F. Talbot, judge.

George S. Sawyer for respondent.
Henry Rives and T. J. Osborne for appellants.

On petition for rehearing.

By BONNIFIELD, *J.*:

The first ground urged for a rehearing is "that the plaintiff does not pretend to sue except in his own behalf, and it certainly affirmatively appears from the complaint and the admissions in the case that he alone filed a protest in the United States Land Office against defendant's application for a patent, and therefore the appellant claims that this court erred in assuming as it does in the
197 opinion that the plaintiff claimed in his protest or in his action said Fraction mine for himself and his alleged co-owners, George Nesbitt and A. Borth, as tenants in common."

Counsel are in error in the above contention. By the complaint it is alleged that the plaintiff and his co-owners as tenants in common are in possession and entitled to the possession of the Fraction mine, etc.; also that the plaintiff filed in the U. S. Land Office his and his cotenants' adverse claim to that portion of the Sleeper mine embraced within the Fraction mine, and plaintiff prays that the title to said Fraction mine be quieted in him and his cotenants, and such is the decree of the trial court. The adverse claim filed, as aforesaid, alleges substantially that the affiant (the plaintiff here) and his cotenants (naming them), George Nesbitt and A. Borth, are the owners, etc., of the Fraction mine as tenants in common.

By the answer it is alleged "that said plaintiff and the said George Nesbitt and A. Borth base their rights to such possession (of a portion of the Sleeper mine) upon the alleged pretended location called by them the Fraction mine." * * *

Where a claim is owned by more than one individual it is customary to select one to act in behalf of all, for which purpose a special power of attorney is executed and filed with the application; but this is not necessary (Lindley on Mines, sec. 681). The practice of the department has been to recognize such application, signed by one joint owner in behalf of himself and the remaining owners (*id.*, Ayers *vs.* Dailey, 3 Copp's L. O., 196). Unquestionably an act

manifestly done by one co-owner for the benefit of all would
198 be presumed to be authorized or at least ratified (Lindley, sec. 681).

The contention of petitioner that neither the certificates of sale of the interests of De Beck and Stevens in the Fraction mine nor the deeds of the officer show color of title in Nesbitt Bros., we think, is not correct. The certificates are regular in form and fully comply with sec. 3253, General Statutes of Nevada, which provides that "upon a sale of real estate (under execution) the purchaser shall be substituted to and acquire all the right, title, interest, and claim of the judgment debtor thereto, and when the estate is less than a freehold of two years' unexpired term the sale shall be absolute. In all other cases the real property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing * * *. A duplicate of such certificate shall be filed by the officer in the office of the recorder of the county." All of which the officer did.

The deeds are also regular in form and purport to convey by the officer said interests of De Beck and Stevens in said mine to Nesbitt Bros.

Petitioner further claims that if the judgment is affirmed the patent will be issued to the plaintiff, and that De Beck and Stevens will be robbed of possibly immensely valuable property; but it does not appear that De Beck and Stevens would be robbed of anything, or, if they were, how the appellant would be affected thereby. It does not appear that they have or claim to have any interest in said mine. It appears that they left the State about five years ago,
and there is no intimation that they ever intend to return.
199 It appears that after the location of said mine they did nothing to preserve their interests therein, and that nothing was done for them in that respect. Besides, this action is a continuation of the proceedings instituted in the U. S. Land Office, and it does not appear that De Beck and Stevens or either of them filed any protest or adverse claim in that office, or that any was filed in their behalf.

(Wolverton *vs.* Nichols, 119 U. S., 485; Doe *vs.* Waterloo M. Co., 43 Fed., 219.)

"The statute makes such a proceeding regularly prosecuted when the period of notice is completed without the presentation of an adverse claim absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding *in rem*, and is binding upon all the world, so far as any unrepresented adverse claim is concerned" (Hamilton *vs.* Southern Nevada Gold & Silver Mining Company, 13 Sawyer, 113).

"The publication and posting of notice of the application for patent is a process which brings all adverse claimants into court—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for to appear and file their adverse claim."

(Lindley on Mines, sec. 713, and cases cited.)

"It is so well established as to be axiomatic that a failure to file an adverse claim within the time fixed by law operates as a waiver of all rights which were the proper subject of such a claim" (Lindley, sec. 742, note 1).

We find no valid reason for granting a rehearing. It therefore is denied.

200 We concur.

BELKNAP, *C. J.*
MASSEY, *J.*

Filed May 25, 1898.

EUGENE HOWELL,
Secretary of State and ex Officio Clerk of the Supreme Court.

201 *Bond.*

Know all men by these presents that we, De La Mar's Nevada Gold Mining Company, as principal, and John Rosser and John Wagner, as sureties, are held and firmly bound unto James Nesbitt in the penal sum of $5,000; for payment of which, well and truly to be made, we bind ourselves, heirs, executors, administrators, successors, and assigns, jointly, severally, and firmly by these presents.

Sealed with our seals and dated this sixth day of August, 1898.

The condition of the above obligation is such that—

Whereas said De La Mar's Nevada Gold Mining Company did, on or about the twenty-second day of July, A. D. 1898, present a petition for a writ of error to the Honorable Joseph McKenna, one of the justices of the Supreme Court of the United States of America, praying that said petition be granted and that writ of error ordered to be issued by him from the Supreme Court of the United States of America, to the end that said Supreme Court of the United States of America should consider and review a certain decision of the supreme court of the State of Nevada, ordered and filed in said court on the 30th day of March, 1898, in a case then pending in said court, wherein said James Nesbitt was plaintiff and said De La Mar's Nevada Gold Mining Company was defendant; and

Whereas said Joseph McKenna, one of the justices of the Supreme Court of the United States of America, as aforesaid, has granted the said petition and writ of error and ordered the issuance of said writ of error; and

202 Whereas said De La Mar's Nevada Gold Mining Company, plaintiff in error, does and requests that all further proceedings in said case of James Nesbitt against it be stayed pending the decision of said Supreme Court of the United States of America upon said writ of error:

Now, therefore, if the said obligor, De La Mar's Nevada Gold Mining Company shall prosecute said writ of error promptly and to effect and shall pay or cause to be paid all costs and charges that it may legally be held to pay in the prosecution of said writ of error and shall further pay or cause to be paid all damages that said

Supreme Court of the United States of America or said supreme court of the State of Nevada may declare and adjudge that it should pay in case such writ of error shall be held by the Supreme Court of the United States of America to have been improperly or wrongfully granted or in case the said writ of error should be for any cause dismissed, then this obligation to be null and void, but otherwise to be and remain in full force and virtue.

In witness whereof said principal, De La Mar's Nevada Gold Mining Company, has caused these presents to be executed for and as its act and deed by H. A. Cohen, its general manager, who has been thereunto duly authorized by a resolution of its board of trustees regularly passed and entered of record on the minutes of said board, and by said sureties themselves, under their hands and seals, this 6th day of August, 1898.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
By H. A. COHEN,
Its Agent and Attorney-in-fact.

203 JOHN WAGNER, *Surety.* [SEAL.]
JOHN ROSSER, *Surety.*

STATE OF NEVADA, }
County of Ormsby, } *ss:*

John Rosser and John Wagner, being each duly sworn, on oath do severally state that they are sureties on the within obligation and that each of them is worth the sum of $5,000 over and above all his just debts, liabilities, and exemptions.

JOHN ROSSER.
JOHN WAGNER.

Subscribed and sworn to before me this 6th day of August, 1898
T. J. EDWARDS,
[SEAL.] *Clerk U. S. Circuit Court, District of Nevada.*

The within bond is hereby approved as to the sufficiency of the sureties.

C. H. BELKNAP,
Chief Justice of the Supreme Court of the State of Nevada.

August 12, 1898.

Approved:
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

204 (Endorsed:) No. 1529. In the supreme court of the State of Nevada. James Nesbitt, respondent, *vs.* De Lamar's Nevada Gold Mining Company, appellant. Bond. Filed September 21st, 1898. Eugene Howell, secretary of state and *ex officio* clerk of the supreme court.

205 STATE OF NEVADA, *ss*:

I, Eugene Howell, the duly elected, qualified, and acting secretary of state and *ex officio* clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing transcript from pages 1 to 187 is a true, full, and correct copy of the original record on appeal in the cause entitled "James Nesbitt, respondent, *vs.* De Lamar's Nevada Gold Mining Company, appellant," as the same now appears on file in my office, and that the foregoing copy from pages 187 to 201 is a true, full, and correct copy of the original opinion and judgment rendered by the supreme court of the State of Nevada in said case, and that the foregoing copy from pages 201 to 205 is a true, full, and correct copy of the supersedeas bond as duly approved by the Hon. Joseph McKenna, associate justice of the Supreme Court of the United States, in said case, as the same appears of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at my office, in Carson City, Nevada, this fourth day of October, A. D. 1898.

[Ten-cent U. S. internal-revenue stamp, canceled 10, 3, '98. E. H.]
[Seal Supreme Court, State of Nevada.]

EUGENE HOWELL,
Secretary of State and ex Officio Clerk of the Supreme Court of the State of Nevada.

206 In the Supreme Court of the United States of America.

DE LA MAR'S NEVADA GOLD MINING COMPANY, Plaintiff in Error,
against
JAMES NESBITT, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the State of Nevada.

To the Honorable Joseph McKenna, justice of the Supreme Court of the United States.

Your petitioner, De La Mar's Nevada Gold Mining Company, would respectfully represent to your honor:

1st. That on the 26th day of January, A. D. 1897, the said defendant in error, as plaintiff, filed his compiaint against one W. M. Davidson, as defendant, in the district court of the fourth judicial district of the State of Nevada, held in and for Lincoln county, wherein said James Nesbitt claimed to be the owner and in possession of that certain mine and mining claim situated in the Ferguson mining district, in the county of Lincoln, State of Nevada, and called the "Fraction" mine or mining claim, and praying that his title thereto be quieted, and that he be decreed to be the owner and entitled to the possession thereof as against all parties, except the United States Government, and, after due issuance and service of process, issue was properly joined by

the pleadings of the parties to said cause, and there-
207 after, on the 2nd day of June, A. D. 1897, a trial of said cause was had in said district court before the Hon. G. F. Talbot, the presiding judge thereof, at which trial certain evidence was introduced in said cause by the parties thereto, and after argument, on the 7th day of June, A. D. 1897, said judge decided said cause in favor of said plaintiff, James Nesbitt, and said judge thereupon ordered, adjudged, and decreed that the said plaintiff and his co-owners were the owners of said mining claim as against all parties, except the Government of the United States, and that their title thereto should be quieted, and that said defendant was not entitled to a United States patent to that portion of the mining claim known as the "Sleeper" mining claim, embraced within the boundary lines of said "Fraction" mine and mining claim, all of which said procedure, pleadings, testimony, and decree fully appear and are set out in the transcript and original files in said district court, now on file and a part of the record in this cause in this court, to which reference is hereby made.

2nd. That on or about the 1st day of December, A. D. 1897, pending motion for a new trial of said cause in said district court, said above-named plaintiff in error, De La Mar's Nevada Gold Mining Company, was substituted as defendant in said cause, in lieu of and as successor in interest to said defendant, W. M. Davidson, and thereafter all proceedings were had in said cause with said James Nesbitt as plaintiff and said De La Mar's Nevada Gold Mining Company as defendant.

3rd. That on the 20th day of December, A. D. 1897, a motion for a new trial was made in said cause by said defendant, De La Mar's Nevada Gold Mining Company, and was argued in said district court and overruled by the judge thereof, and thereafter said defendant duly perfected his appeal to the supreme court of the State of Nevada.

208 4th. That on the 30th day of March, A. D. 1898, and at the January term, A. D. 1898, of the supreme court of the State of Nevada, after argument thereof was duly had, said supreme court affirmed the judgment of the district court in this cause, as duly appears by the decision of said supreme court filed therein.

5th. That on the 25th day of May, A. D. 1898, said supreme court overruled and refused to grant a motion for a rehearing in this cause, as appears by the records of said court in this cause.

6th. That, as will fully appear by the evidence, pleadings, arguments, and decisions of said district court and of said supreme court now on file and constituting the complete record of this cause in this court, said plaintiff, Nesbitt, claimed to have derived title to said "Fraction" mining claim as successor in interest to W. De Beck and H. Stevens, two of the original locators of said claim, by virtue of execution levies, sales, and purchases by said plaintiff of said mining claim under alleged judgments in his favor and in favor of George Nesbitt against said De Beck and Stevens, and that after receiving certificates of sale thereof issued to him on August 11th, 1893, by the officer selling said claim under said execution

said plaintiff, Nesbitt, and said George Nesbitt, in December, 1893, attempted to hold said claim and avoid the doing of any annual labor thereon by filing a notice under the provisions of the special act of Congress of November 3rd, 1893, suspending the operation and requirements of sec. 2324 of the Revised Statutes of the United States, and claiming in said notice to be the owners and to be entitled to avail themselves of the provisions of the said special act, and again, in the year 1894, filed a similar notice under the special act of July 18, 1894, suspending again for the year 1894 the
209 requirements of said sec. 2324 of the Revised Statutes of the United States, again claiming in said notice to be the owners of said mining claim and entitled to avail themselves of the provisions of said special act, having on February 19th, 1894, received from the officer making said execution sales deeds of said property for lack of redemption thereof.

7th. That the title, if any, of said plaintiff, Nesbitt, and George Nesbitt to said property, as shown by the record in this cause, wholly rests upon said alleged judicial sales and deeds and upon the notices filed in 1893 and 1894, as above set forth, and said plaintiff, Nesbitt, and George Nesbitt have no other or further title thereto or claim thereon.

8th. That the "Sleeper" mining claim, embracing and covering the same ground as said "Fraction" mining claim, was in January, A. D. 1895, duly located under the regulations of the Ferguson mining district and under the laws of the United States by one James Murphy and said W. M. Davidson jointly as a mining claim, and that said De La Mar's Nevada Gold Mining Company is the legal successor in interest and assignee and grantee of said parties so locating said "Sleeper" mining claim.

9th. That during the years 1895, 1896, and 1897 both of the parties claiming said ground did the necessary and requisite assessment-work thereon under the laws of the United States.

10th. That both the said district court and the supreme court of the State of Nevada in their decisions in this cause held that said plaintiff, Nesbitt, and George Nesbitt failed to acquire any right, interest, or title in said "Fraction" mining claim by reason of said execution, levies, and sale, for the reason that the justice of the peace who entered the judgments on which said executions were issued had no jurisdiction to render said judgments, and the certificates of sales and deeds given by the officer making said sales to the
210 plaintiff Nesbitt and George Nesbitt were admitted in evidence, over the objection of defendant, only for the purpose of showing or tending to show color of title and adverse possession of said property in said Nesbitt and for no other purpose.

11th. That the only right, title, interest, or claim that said plaintiff, Nesbitt, or George Nesbitt had or claimed to have upon said property to entitle them to claim the benefit of said special acts of 1893 and 1894, above referred to, was based upon said void certificates of sale and deeds.

12th. That certain testimony in said cause, as appears by the record, attempts to show that one A. Borth, one of the original

locators of said "Fraction" mining claim, but who was not and never has been a party to this cause, recognized said plaintiff, Nesbitt, and said George Nesbitt, his brother, as cotenants with him of said claim, and in September or October, 1893, authorized or requested said Nesbitts, on his and their mutual behalf, to file the required notice under said act of 1893, and again in 1894 authorized or requested said Nesbitts to file the required notice under said special act of 1894 to avoid the necessity of performing the annual labor on said claim, as required by law, and that said A. Borth nowhere appears as interested in said claim or to claim an interest by said notices nor does his name appear therein and nowhere and in no way appears to have or otherwise claim an interest in said property as cotenant, co-owner, or otherwise except by virtue of said evidence; the introduction of all and every part of which was duly objected to by said plaintiff in error.

13th. That the said district court and the supreme court of the State of Nevada in said cause both hold that the vital question in said cause was whether the said notices that the Nesbitt Bros.
211 caused to be recorded of their intention to hold and work said mine under said special acts of 1893 and 1894 had the legal effect of saving the mine from relocation for any period of time, and whether said Nesbitt Bros. so interested, if at all, in said mine could be recognized as "claimants" of said mine sufficiently to entitle them to claim and avail themselves of the provisions of said special act- of 1893 and of 1894, to the end that said mine should be saved to them thereby, free from relocation by defendant's assigns; that said district court and said supreme court in its decisions in said cause hold that said Nesbitt Bros., one of whom is plaintiff herein, as representing said "Fraction" mine, together with A. Borth, one of the original locators, under whose authority and authorization they acted, had and held sufficient interest in and claim upon said "Fraction" mining claim to entitle them to claim the benefits of said special acts of 1893 and 1894 as co-claimants, and to be recognized as "claimants" under said special acts of 1893 and 1894, and that said Nesbitt and A. Borth, as co-claimants, were the rightful owners of said claim and entitled thereto as against the defendants and all other parties, except the Government of the United States, and that the title to said "Fraction" mining claim should be quieted in them.

14th. That the final decision of this court in said cause fairly and clearly depends upon the proper construction to be given to said special acts of 1893 and 1894, and the character and extent of interest a party must have in a mining claim to entitle him to the benefit of said special acts and to be recognized as a "claimant" of mining property under the provisions thereof, and that a construction of the intent and effect of said special acts and of the meaning of the words "claimant or claimants" was essential and necessary to the rendering of a final decree in this cause, and without
212 such construction of said special acts said cause could not have been decided by said supreme court of the State of Nevada.

15th. That in consequence thereof the proper construction and meaning of a United States statute is involved in said cause and a Federal question is involved, and it is proper and right, under page 709 of the Revised Statutes of the United States, that this cause should be removed to the Supreme Court of the United States, to the end said *said* court may finally pass upon and determine the proper and just construction that should be placed upon said special acts of 1893 and 1894.

16th. That the plaintiff in error herein, as shown by the record in this cause, was the defendant in said cause in said district and supreme courts, and is the suitable and proper party to ask to remove said cause to the Supreme Court of the United States by a writ of error.

Plaintiff in error assigns the following as errors of law in the decisions of said supreme court of the State of Nevada:

1. That the said court erred in its ruling that A. Borth and the Nesbitt Bros., under the evidence, mutually recognized each other as co-owners of said mining claim, and that said notices filed by Nesbitt Bros. in 1893 and 1894 were filed by them on behalf of and in protection of the rights of both said Nesbitt Bros. and A. Borth, and were effective to protect the rights of Nesbitt Bros. and A. Borth in and to said mining claim, and so save the same from relocation.

2. That said court erred in considering any and all testimony in the record showing or tending to show that A. Borth and the Nesbitt Bros. mutually recognized each other as co-owners in said mining claim, and that said notices filed in 1893 and 1894 were filed by Nesbitt Bros. at the request of A. Borth and upon consul-
213 tation and agreement between said Nesbitt Bros. and A. Borth to protect the rights of all, the introduction of all and every part of said evidence having been properly objected to by plaintiff in error, as appears by the record in this cause.

3. The said court erred in deciding that in consequence of said notices so filed by Nesbitt Bros. in 1893 and 1894 said mine was not forfeited nor subject to relocation when the location of the "Sleeper" mine was made in January, 1895.

4. That said court erred in ruling that the location of the "Sleeper" mine was invalid in so far as it covered the "Fraction" mining claim.

5. That the said court erred in its construction of the special acts of 1893 and 1894 as to who are rightfully entitled to be considered as "claimants" under said acts, and in ruling that said defendant in error or Nesbitt Bros. had such an interest in said "Fraction" mining claim as to entitle them to save said claim from forfeiture and relocation under the provisions of said special acts.

6. That the said court erred in considering the certificates of sale or the deeds to said "Fraction" mining claim issued by the officer to Nesbitt Bros. or either of them as constituting any interest in or claim upon said mining claim in favor of said Nesbitt Bros. or either of them.

7. That the said court erred in affirming the judgment of the dis-

trict court in this cause quieting the title of said "Fraction" m
ing claim in said Nesbitt Bros. or A. Borth.

8. That the said court erred in refusing to quiet the title of s
"Fraction" mining claim in plaintiff in error and in not decreei
the plaintiff in error to be the owner and entitled to the possessi
of said claim.

Wherefore plaintiff in error prays that your honor gra
214 a writ of error from the supreme court of the State of Neva
to the Supreme Court of the United States in said cause
James Nesbitt, plaintiff, *vs.* De La Mar's Nevada Gold Mini
Company, defendant, and that said writ of error operate as
supersedeas upon plaintiff in error filing a supersedeas bond
such sum as your honor may determine.

F. G. WAITE AND
HENRY RIVES,
Solicitors for Petitioner

215 Desiring and deeming it just to give to petitioner in er
an opportunity to test in the Supreme Court of the Unit
States the questions presented in the foregoing petition in err
it is—

Ordered that its petition for a writ of error be granted, and th
said writ of error issue and that the same operate as a supersed
upon plaintiff in error giving a good and sufficient bond in t
penal sum of five thousand dollars.

JOSEPH McKENNA,
Justice of the Supreme Court of the
United States of America

July 22nd, 1898.

216 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States
America to the honorable the judg
of the supreme court of the State
Nevada, Greeting:

Because in the record and proceedings, as also in the renditi
of the judgment of a plea which is in the said supreme court, bef
you or some of you, being the highest court of law or equity
the said State in which a decision could be had in the said suit
tween De Lamar's Nevada Gold Mining Company, appellant, a
James Nesbitt, appellee, wherein was drawn in question the validity
a treaty or statute of or an authority exercised under the United Sta
and the decision was against their validity, or wherein was drawn
question the validity of a statute of or an authority exercised un
said State, on the ground of their being repugnant to the Cons
tution, treaties, or laws of the United States, and the decision w
in favor of such their validity, or wherein was drawn in qu
217 tion the construction of a clause of the Constitution or o
treaty or statute of or commission held under the Uni
States and the decision was against the title, right, privilege,

exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

217½ We, M. S. Bonnifield and C. H. Belknap, constituting a majority of the judges of the supreme court of the State of Nevada, do hereby admit service of the within writ this 21st day of September, A. D. 1898.

M. S. BONNIFIELD.
C. H. BELKNAP.

218 UNITED STATES OF AMERICA, *ss:*

To James Nesbitt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nevada, wherein De Lamar's Nevada Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 22d day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

219 On this ninth day of September, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared before me the subscriber, J. Johnson, a citizen of the United States over the age of twenty-one years, and makes oath that he delivered a true copy of the within citation to James Nesbitt on the 9th day of September, 1898, at the town of De Lamar, in the county of Lincoln, State of Nevada.

J. JOHNSON.

Sworn to and subscribed the 9th day of September, A. D. 1898.

[Seal of F. R. McNamee, Notary Public, Lincoln County, Nevada.]

F. R. McNAMEE,
Notary Public.

Endorsed on cover: Case No. 17,025. Nevada supreme court. Term No., 152. De Lamar's Nevada Gold Mining Company, plaintiff in error, *vs.* James Nesbitt. Filed October 15th, 1898.

No. 152.

Brief of Stewart & Ralston for

Filed Oct. 16, 1899

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
PLAINTIFF IN ERROR,

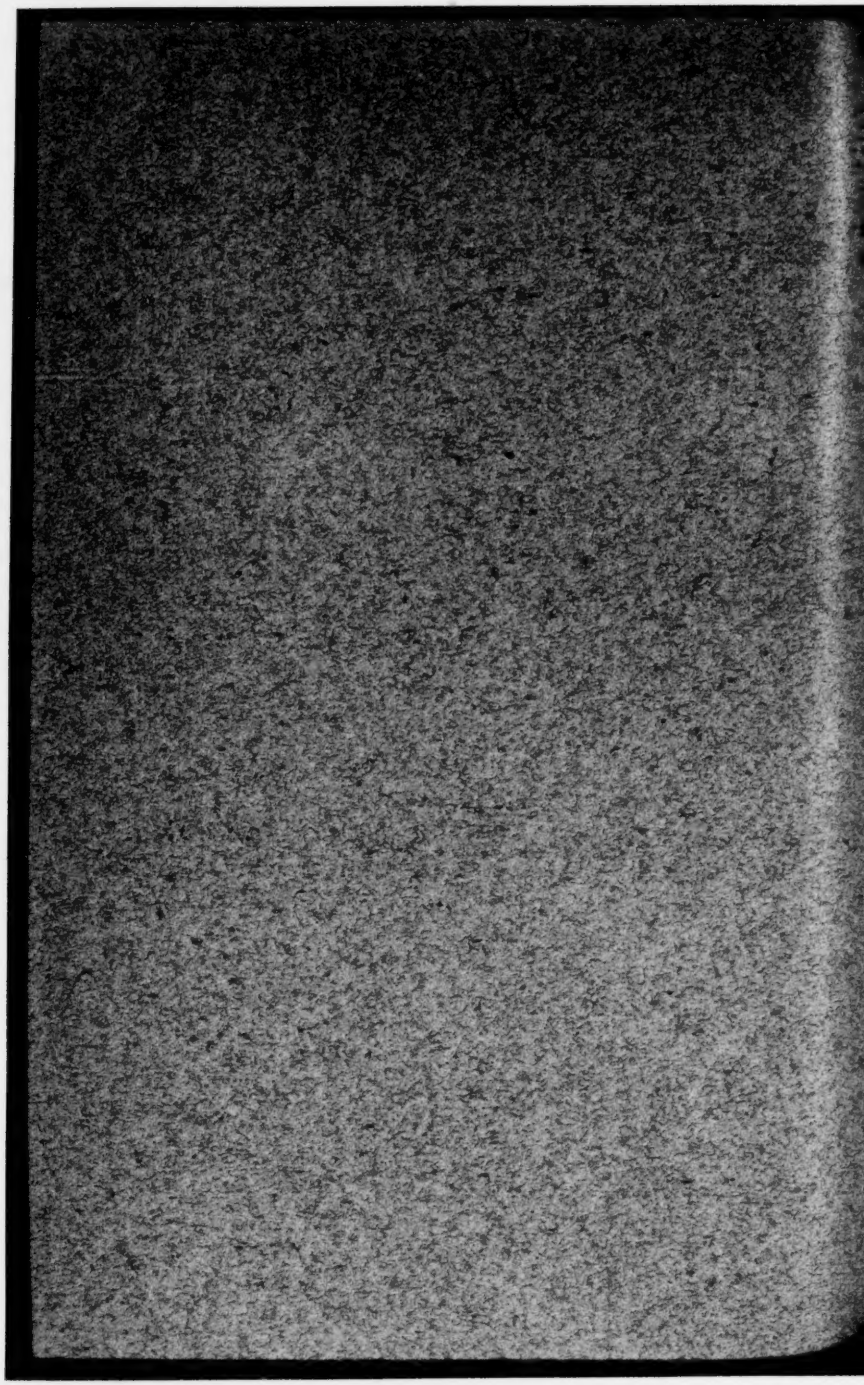
vs.

JAMES NESBITT, DEFENDANT IN ERROR.

Brief on Motion to Dismiss for Want of Federal Question and Also Upon the Merits.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

LAW REPORTER PRINT.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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PLAINTIFF IN ERROR,

vs.

JAMES NESBITT, DEFENDANT IN ERROR.

Brief on Motion to Dismiss for Want of Federal Question and Also Upon the Merits.

STATEMENT OF FACTS.

The defendant in error in this case, James Nesbitt, was plaintiff in the original suit, which was brought against William M. Davidson, as defendant, and in which Nesbitt sought a decree quieting the title in himself and his cotenants (who were not named), to the Fraction Mine and Mining Claim, and, also, that the defendant was not entitled to a United States patent to a conflicting location, known as The Sleeper Mine and Mining Claim. The plaintiff claimed an undivided three-eighths interest in the Fraction. A decree in favor of the plaintiff was awarded by the District Court of Lincoln County, Nevada, and on appeal to the Supreme Court of Nevada, this decree was affirmed.

The facts as disclosed by the record, are as follows:

On or about May 15, 1892, W. L. De Beque, H. Stevens and

A. Borth located the Fraction Mine, and performed the acts necessary to make the location valid. They did no assessment work, directly or indirectly, upon the land in the years 1893 and 1894, and the first work after 1892 performed by anybody purporting to represent any of the locators named above, was in December, 1895, and in the early part of 1896. (Folio 60.)

On May 12, 1893, James and George Nesbitt, partners, under the name of J. Nesbitt & Brother, filed two suits, one against H. Stevens, and the other against W. L. De Beque, such suits being filed in the justice's court for Pioche Township, Lincoln County, Nevada, and, the complaint being verified (folios 121, 122, 149 and 150), summonses were immediately issued against the respective defendants (folios 124, 125, 152 and 153), returnable on July 10, 1893. On the same day, May 12, 1893, attachments were issued against the respective defendants and delivered to a special deputy for service (folios 127, 128, 155, 156 and 157). On the following day, May 13, 1893, affidavits, as foundation for service by publication, were sworn to and filed in the justice's court (folios 129, 130, 158 and 159). The order of publication was duly published, and without any judgment, so far as shown by the Record, having been entered up against either of the defendants and without issuance of any execution, except as shown by recitals on folios 139 and 166, a special deputy undertook to sell on August 11, 1893, two undivided halves of the Fraction Mine to J. Nesbitt & Brother, giving the purchasers on that date certificates of sales, as will appear by reference to folios 139, 140, 166 and 167 of the Record. The period of redemption under valid certificates of the sort above mentioned was six months, and in this case expired on February 11, 1894. Deeds for the property above described were, on February 19, 1894, executed by J. A. Denton, special deputy, to J. Nesbitt & Brother.

No work having been done in the Fraction Mine during

the year 1893, the defendant in error and his brother, on December 26, 1893, filed notice of intention under the Act of Congress approved November 3, 1893, (folio 175), and no work occurring under the claim for the Fraction Mine during the year 1894, the same parties, on December 22, 1894, filed a similar notice, under the provisions of the act approved July 18, 1894, (folio 178).

On January 1, 1895, William M. Davidson and Joseph Murphy located the Sleeper Mine, complying with all the United States statutes in connection with such location; Murphy subsequently conveying his interest to Davidson, the defendant in the original suit.

During the progress of the present litigation, Davidson conveyed his title to the plaintiff in error (folio 37), who was substituted as party defendant in his place. This quit claim covered the ground embraced in the Fraction claim. All assessment work was done by Davidson and Murphy upon the claim in the year 1895, and, in fact, no one, except Davidson, exercised any degree of possession over any portion of the property until December of that year. In 1896 the assessment work was again performed by Davidson, or at his instance.

Upon the foregoing facts, the plaintiff below claimed that the title to the property in controversy became vested one-fourth in A. Borth (the interest shown by his original location notice, [folio 184]), three-eighths in James Nesbitt, and three-eighths in George Nesbitt, while the defendant below claims the entire interest in the property by virtue of the Davidson and Murphy location.

ASSIGNMENTS OF ERROR.

1. That the Nevada Supreme Court erred in its ruling that A. Borth and the Nesbitt brothers, under the evidence, mutually recognized each other as co-owners of said mining claim,

and that said notices filed by Nesbitt brothers in 1893 and 1894 were filed by them on behalf of, and in protection of, the rights of both said Nesbitt brothers and A. Borth, and were effective to protect the rights of Nesbitt brothers and A. Borth in and to said mining claim, and so save the same from relocation.

2. That said court erred in considering any and all testimony in the Record showing or tending to show that A. Borth and the Nesbitt brothers mutually recognized each other as co-owners in said mining claim, and that said notices filed in 1893 and 1894 were filed by Nesbitt brothers at the request of A. Borth, and upon consultation and agreement between said Nesbitt brothers and A. Borth to protect the rights of all, the introduction of all and every part of said evidence having been properly objected to by plaintiff in error, as appears by the Record in this cause.

3. The said court erred in deciding that in consequence of said notices so filed by Nesbitt brothers in 1893 and 1894 said mine was not forfeited or subject to relocation when the location of the Sleeper Mine was made in January, 1895.

4. That said court erred in ruling that the location of the Sleeper Mine was invalid in so far as it covered the Fraction mining claim.

5. That the said court erred in its construction of the special acts of 1893 and 1894 as to who are rightfully entitled to be considered as "claimants" under said acts, and in ruling that said defendant in error or Nesbitt brothers had such an interest in said Fraction mining claim as to entitle them to save said claim from forfeiture and relocation under the provisions of said special acts.

6. That the said court erred in considering the certificates of sale or the deeds to said Fraction mining claim issued by the officer to Nesbitt brothers, or either of them as constituting any interest in or claim upon said mining claim in favor of said Nesbitt brothers, or either of them.

7. That the said court erred in affirming the judgment of

the district court in this cause quieting the title of said Fraction mining claim in said Nesbitt brothers or A. Borth.

8. That the said court erred in refusing to quiet the title of said Fraction mining claim in plaintiff in error, and in not decreeing the plaintiff in error to be the owner and entitled to the possession of said claim.

ARGUMENT.

It is contended on behalf of the defendant in error that no Federal question is involved in the pending case, and that, therefore, the writ of error should be dismissed. A careful perusal of the brief filed on behalf of the defendant in error, discloses the fact that a Federal question is involved, the brief stating that—

> "the only statute of the United States, the construction of which was brought to the attention of the State courts, was the Act of Congress of July 18, 1894." And again, "the validity of the statute was upheld by the State court." (Brief, p. 5).

A Federal question was plainly involved. The opinion and opinion on rehearing of the Supreme Court of Nevada discuss the application of the statutes involved. The plaintiff below claimed that he had, by virtue of the provisions of the United States statutes, and as against all the world, except the United States, a right to the possession of the land in controversy. The defendant claimed that because of the want of title on the part of the plaintiff below he had no right to any relief at the hands of the court, and that because of such want of title he was not a claimant within the meaning of the two statutes to which reference was made in the statement of facts.

Our first contention therefore, is, that there was no such title in the Nesbitts as would justify them, or either of them, in filing the original suit in this case. Their only title was

based upon certain attachment proceedings, which a careful review of the foregoing statement and additional facts to be now mentioned will prove to have been entirely invalid. It will be noted that the original summons was issued May 12, 1893, and was made returnable July 10, 1893. On the day of its issuance the Record failed to disclose in any manner that the defendants were non-residents. It could only be regarded in the light of an original summons before a justice, and as such should have been made returnable "in not less than two, nor more than ten, days after its date."

Section 3539, General Statutes of Nevada.

By Section 3146 of the same statutes, when an attachment is to be issued against a non-resident, there must first be filed an affidavit by or on behalf of the plaintiff showing—

> "First: that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract for the direct payment of money, and that such contract was made, or is, by the terms thereof, payable in this State, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property situate or being in this State, or, if so secured, that said security has been rendered nugatory by the act of the defendant; or, Second: That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness as near as may be over and above all legal set-offs or counterclaims), and that the defendant is a non-resident of the State. Third: That the sum for which the attachment is asked is an actual *bona fide* existing debt due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant."

Not one of these requirements was met in any way.

No affidavit whatever was filed before the issuance of the attachment on May 12, 1893, and the only one ever filed

was presented the following day for the obtainment of an order of publication. The attachment was therefore void.

Furthermore, when it is desired to obtain service by publication, it is necessary that the plaintiff shall fulfill the requirements of Section 3052, providing that—

> "when the person on whom the service is to be made resides out of the State, or has departed from the State, or can not, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation, or joint stock association, can not be served as provided in Section twenty-nine (3051), and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

In the present case affidavits were filed to the effect that the defendants had departed from the State of Nevada and could not, after due diligence, be found therein, and that service of summons upon them in said action could not be made, except by the publication thereof (folios 129 and 158). It will be observed that these affidavits do not show that a cause of action existed against the defendants in respect to whom the service was to be made, and the complaints were not made part of the affidavits, although an attempt to supply the deficiencies was apparently made by the justice, who recited, in his orders permitting publication, that "from a consideration of the complaint, it appears that a cause of action exists." We respectfully submit that the action of the justice was manifestly erroneous, and that the fact should have been made to appear to his satisfaction, in accordance with the section under consideration, by affidavit. Certainly the case, in this respect, absolutely departs from statutory directions.

We need not argue to the court the necessity of an absolute compliance with statutory requirements in a case of this sort, involving, as it does, the technical features attaching to attachment suits and to service of publication.

As showing the absolute invalidity of the proceedings herein, for the reasons above pointed out, we refer to—

Roy *vs.* Whitford, 9 Nev. 370.
Little *vs.* Currie, 5 Nev. 90.
Ricketson *vs.* Richardson, 26 Cal. 149.
Braly *vs.* Seaman, 30 Cal. 610.
Forbes *vs.* Hyde, 31 Cal. 342.
Victor M. & M. Co. *vs.* Justice's Court, 18 Nev. 21.

Where a justice's court acts without jurisdiction, its judgment is a nullity, not voidable, but void.

12 Am. & Eng. Ency. Law, 400.

Consideration of the foregoing demonstrates clearly the fact that no title whatever to the Fraction Mine was conveyed to James and George Nesbitt by reason of the above recited proceedings, and, in fact, this conclusion was apparently admitted by the trial court, and also by the Supreme Court of the State of Nevada (fols. 78, 191). It was, however, contended by both courts that although the proceedings might be insufficient to confer title, the certificates of sale and deeds were nevertheless sufficient to constitute color of title, and that the Nesbitts, having color of title, were in position to file the declarations of intention before alluded to.

We contend that, in the first place, the Nesbitts had no color of title under any proper interpretation of the law when the first declaration of intention was filed. On that date, December 26, 1893, all that they possessed was the certificates of the special deputy, showing that the sales had taken place under an execution; and the title had not yet ripened because of the right of the defendants in execution to

redeem their property. The title, therefore, was still in De Beque and Stevens.

The certificates were insufficient as color of title for the further reason that they did not, on their face, purport to convey title. An analogous case to this is that of a certificate of purchase at a tax sale, which for the reasons above given has been repeatedly held not to constitute color of title.

Bride *vs.* Watt, 23 Ill. 507.
Dickenson *vs.* Breeden, 30 Ill. 279.
McKeighan *vs.* Hopkins, 14 Neb. 361.

Similarly, a pre-emption certificate and claim, while possibly sufficient to maintain trespass to try title, is not until perfected title or color of title.

Buford *vs.* Bostick, 58 Texas, 63.
Clark *vs.* Smith, 59 Texas, 275.

If, therefore, the Nesbitts never having had possession or exercised any acts of ownership over the land prior to January 1, 1894, and not having had before that time color of title to the land, filed, as they did, on December 26, 1893, a certificate of intention, surely such act upon their part must have been a mere nullity. In its filing, as will appear by reference to the Record, they acted upon their own behalf and not on the behalf of Borth or anybody having any record interest in the land, (folio 175).

In view of the foregoing, what importance shall we attach to the declaration of intention filed December 22, 1894 (folio 178)? None, whatever, as it seems to us. The statute was made for the benefit of the claimant or claimants of any mining location. During the year 1894, the Nesbitts were not claimants within the meaning of this act. Their supposed title was based upon the title of Stevens and De Beque, who never filed any notice of intention in 1893, or performed any labor in that year, and whose rights had

therefore lapsed. The Nesbitts themselves had performed no labor in 1893, and their only title to consider themselves claimants was based upon their possession of a deed executed in 1894, purporting to be based upon mining rights which had already been lost.

We understand by the term "claimant" a man who has put himself in a position to make a legal, or apparently legal, claim to land; not one who, so far as the title is concerned, appears to be a mere volunteer. A mining claimant under the United States mining laws is evidently a man who has located a mining claim or who holds under someone who had made such a location. In 1894 the Nesbitts had not located any mining claim, nor did they, so far as the Fraction Mine was concerned, succeed to the rights of anyone who had made such a location, the original locators having failed to maintain their position. The court below manifestly erred in treating the Nesbitts as mining claimants within the meaning of the statutes of Congress, and in this respect failed, as we respectfully submit, in the proper interpretation of the mining laws of the United States.

But even if the certificate of sale and the deed to the Nesbitts had constituted color of title, we must, nevertheless, earnestly insist that such title does not meet the requirements of the present case. Color of title serves to show that the person having it is claiming title, the kind of title he claims, and also to fix the boundaries of the claim, but it does not constitute title in itself. The only advantage of having color of title is in connection with some actual possession, and in this case no such possession was had in 1893, 1894 or 1895 (until the middle of December), so far as the Record discloses, by or on behalf of the supposed Nesbitt interest.

The record of the deeds to the Nesbitt brothers did not constitute notice to anybody of the existence of a title in them, for, as we have shown, the deeds were based upon certain invalid proceedings. So far as the Record discloses,

when the deeds to the Nesbitts were placed of record, the title, if any, to the Fraction Mine was outstanding in De Beque, Stevens and Borth. The recordation of deeds based upon invalid sales did not change the condition of the title. There was nothing in the Nesbitts' claim upon which they could have predicated a title, or hoped to recover in any possessory action. As against Stevens and De Beque, their title could have been instantly quieted. As against the rest of the world, they did not hold possession of the land, nor had they the ability to recover it in any imaginable suit.

If, therefore, as we insist, the title to these premises was, in the fall of 1893, in Stevens, De Beque and Borth, the question arises, did they maintain their title in conformity with the United States statutes? No one of them filed a certificate of intention.

Nesbitt claims to have filed a certificate on behalf of Borth, and Borth so testifies. Laying aside the intrinsic improbabilities of the statement of Borth (as to which we only need refer to the fact that he says his agreement, that Nesbitt should on his behalf file a declaration of intention, was made in September, 1893, two months before the act of Congress allowing this course was passed, [Folio 81]), could such a certificate have been filed by Nesbitt without disclosing Borth's name? We submit not. In no possible way, even by void proceedings, was any apparent title of record vested in the Nesbitts until the deeds to them were filed, and this did not occur until September 14, 1896. True it was that on August 18, 1893, the certificates of sale were placed of record, but these certificates, as we have above shown, did not convey or purport to convey title, but expressly provided that the real estate was subject to redemption within six months; and, furthermore, an examination of the proceedings upon which they were based would have disclosed the fact that the title still remained in De Beque and Stevens.

The court below predicated the rights of the Nesbitt brothers upon the consent alleged to have been given by

Borth and to which we have already alluded. The opinion is expressed that—

> "The Fraction Mine being represented by one of the locators, A. Borth, and said Nesbitt Bros. having had said notices recorded, in pursuance of said agreement and at the instance of said Borth as well as of themselves, and under the honest belief of all three that the Nesbitt Bros. had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper Mine was made, and therefore that the location of the Sleeper M ne was and is invalid in so far as it covers the Fraction Mining Claim." (Folio 193.)

It seems to us that the foregoing involves several propositions decidedly unusual, to say the least. The first is, virtually, that the relation of tenant in common can be created as against the world by a mere act of recognition. This involves the theory that De Beque and Stevens must have lost their title because their cotenant recognized some other man as having succeeded to it. We do not believe that title to land can be transferred in any such vague manner as this.

A further implication of the opinion is that an agreement between parties, of which the public has no knowledge, can take the place of record notice required by law in order to effectuate the transfer of title. It would seem to us that such an idea would defeat all necessity for the use of public records and leave the public at the absolute mercy of any claimant to any interest in the land.

But if this agreement were had, and if it had been possible to vest title by such agreement, it next appears that the Nesbitts, having no title of record, undertook in 1893 to file a notice of intention to hold the Fraction Mining Claim, without mentioning Borth's name in any manner whatever,

nor, in fact, was Borth's name mentioned in the certificate filed in 1894. In order, therefore, to sustain any title in the Nesbitts, or in Borth, we are compelled to absolutely disregard all laws calling for notice by record. There certainly was not any notice of record to show that Borth filed such a certificate, nor was there any notice of record that such certificate was filed by his consent. Surely, to leave the gaining or the losing of a title to parol evidence of this character would be contrary to our entire public policy.

As a matter of convenience we attach to this brief copies of the acts of Congress called in question in this case.

In view of the foregoing we respectfully submit that the judgment of the Nevada court should be reversed.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

APPENDIX.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims. (28 Stats. at L. 6.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage.

Approved Nov. 3, 1893.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims. (28 Stats. at L. 114.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

Approved July 18, 1894.

No. 152.
Brf. of Stewart & Ralston for Pltf.

Office Supreme Court U. S.
FILED
FEB 2 1900
JAMES H. McKENNEY, Clerk

Filed Feb. 2, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

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Brief on Motion to Dismiss for Want of Federal Question and Also Upon the Merits.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

LAW REPORTER PRINT.

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The facts as disclosed by the Record are as follows

On or about May 15, 1892, W. L. De Beque, H. Stevens and A. Borth located the Fraction Mine, and performed the acts necessary to make the location valid. They did no assessment work, directly or indirectly, upon the land in the years 1893 and 1894, and the first work after 1892 performed by anybody purporting to represent any of the locators named above was in December, 1895, and in the early part of 1896. (Folio 60).

On May 12, 1893, James and George Nesbitt, partners, under the name of J. Nesbitt & Brother, filed two suits, one against H. Stevens, and the other against W. L. De Beque, such suits being filed in the justice's court for Pioche Township, Lincoln County, Nevada, and, the complaint being verified (folios 121, 122, 149 and 150), summonses were immediately issued against the respective defendants (folios 124, 125, 152 and 153), returnable on July 10, 1893. On the same day, May 12, 1893, attachments were issued against the respective defendants and delivered to a special deputy for service (folios 127, 128, 155, 156 and 157). On the following day, May 13, 1893, affidavits, as foundation for service by publication, were sworn to and filed in the justice's court (folios 129, 130, 158 and 159). The order of publication was duly published, and without any judgment, so far as shown by the Record, having been entered up against either of the defendants and without issuance of any execution, except as shown by recitals on folios 139 and 166, a special deputy undertook to sell on August 11, 1893, two undivided halves of the Fraction Mine to J. Nesbitt & Brother, giving the purchasers on that date certificates of sale, as will appear by reference to folios 139, 140, 166 and 167 of the Record. The period of redemption under certificates of the sort above mentioned was six months, and in this case expired on February 11, 1894. Deeds for the property above described were, on February 19, 1894, executed by J. A. Denton, special deputy, to J. Nesbitt & Brother.

No work having been done in the Fraction Mine during the year 1893, the defendant in error and his brother, on December 26, 1893, filed notice of intention under the Act of Congress approved November 3, 1893 (folio 175), and no work occurring under the claim for the Fraction Mine during the year 1894 the same parties, on December 22, 1894, filed a similar notice, under the provisions of the act approved July 18, 1894 (folio 178).

On January 1, 1895, William M. Davidson and Joseph Murphy located the Sleeper Mine, complying with all the United States statutes in connection with such location; Murphy subsequently conveying his interest to Davidson, the defendant in the original suit.

During the progress of the present litigation, Davidson conveyed his title to the plaintiff in error (folio 37), who was substituted as party defendant in his place. This quit claim covered the ground embraced in the Fraction claim. All assessment work was done by Davidson and Murphy upon the claim in the year 1895, and, in fact, no one, except Davidson, exercised any degree of possession over any portion of the property until December of that year. In 1896 the assessment work was again performed by Davidson, or at his instance.

Upon the foregoing facts the plaintiff below claimed that the title to the property in controversy became vested, one-fourth in A. Borth (the interest shown by his original location notice [folio 184]), three-eighths in James Nesbitt and three-eighths in George Nesbitt, while the defendant below claims the entire interest in the property by virtue of the Davidson and Murphy location.

ASSIGNMENTS OF ERROR.

1. That the Nevada Supreme Court erred in its ruling that A. Borth and the Nesbitt brothers, under the evidence, mutually recognized each other as co-owners of said mining claim,

and that said notices filed by Nesbitt brothers in 1893 and 1894 were filed by them on behalf of, and in protection of, the rights of both said Nesbitt brothers and A. Borth, and were effective to protect the rights of Nesbitt brothers and A. Borth in and to said mining claim, and so save the same from relocation.

2. That said court erred in considering any and all testimony in the Record showing or tending to show that A. Borth and the Nesbitt brothers mutually recognized each other as co-owners in said mining claim, and that said notices filed in 1893 and 1894 were filed by Nesbitt brothers at the request of A. Borth, and upon consultation and agreement between said Nesbitt brothers and A. Borth to protect the rights of all, the introduction of all and every part of said evidence having been properly objected to by plaintiff in error, as appears by the Record in this cause.

3. The said court erred in deciding that in consequence of said notices so filed by Nesbitt brothers in 1893 and 1894 said mine was not forfeited or subject to relocation when the location of the Sleeper Mine was made in January, 1895.

4. That said court erred in ruling that the location of the Sleeper Mine was invalid in so far as it covered the Fraction mining claim.

5. That the said court erred in its construction of the special acts of 1893 and 1894 as to who are rightfully entitled to be considered as "claimants" under said acts, and in ruling that said defendant in error or Nesbitt brothers had such an interest in said Fraction mining claim as to entitle them to save said claim from forfeiture and relocation under the provisions of said special acts.

6. That the said court erred in considering the certificates of sale or the deeds to said Fraction mining claim issued by the officer to Nesbitt brothers, or either of them, as constituting any interest in or claim upon said mining claim in favor of said Nesbitt brothers, or either of them.

7. That the said court erred in affirming the judgment of

the district court in this cause, quieting the title of said Fraction mining claim in said Nesbitt brothers or A. Borth.

8. That the said court erred in refusing to quiet the title of said Fraction mining claim in plaintiff in error, and in not decreeing the plaintiff in error to be the owner and entitled to the possession of said claim.

ARGUMENT.

It is contended on behalf of the defendant in error that no Federal question is involved in the pending case, and that, therefore, the writ of error should be dismissed. A careful perusal of the brief filed on behalf of the defendant in error, discloses the fact that a Federal question is involved, the brief stating that—

> "the only statute of the United States, the construction of which was brought to the attention of the State courts, was the Act of Congress of July 18, 1894." And again, "the validity of the statute was upheld by the State court." (Brief, p. 5).

A Federal question was plainly involved. The opinion and opinion on rehearing of the Supreme Court of Nevada discuss the application of the statutes involved. The plaintiff below claimed that he had, by virtue of the provisions of the United States statutes, and as against all the world, except the United States, a right to the possession of the land in controversy. The defendant claimed that because of the want of title on the part of the plaintiff below he had no right to any relief at the hands of the court, and that because of such want of title he was not a claimant within the meaning of the two statutes to which reference was made in the statement of facts.

Our first contention, therefore, is, that there was no such title in the Nesbitts as would justify them, or either of them, in filing the original suit in this case. Their only title was

based upon certain attachment proceedings which a careful review of the foregoing statement and additional facts that we now mention will prove to have been entirely invalid. It will be noted that the original summons was issued May 12, 1893, and was made returnable July 10, 1893. On the day of its issuance the Record failed to disclose in any manner that the defendants were non-residents. It could only be regarded in the light of an original summons before a justice, and as such should have been made returnable "in not less than two nor more than ten days after its date."

Section 3539, General Statutes of Nevada.

Sections 3145 and 3146 of the General Statutes of Nevada, as amended February 14, 1887, in Statutes of Nevada, 1887, page 55 (applicable also to justices' courts), provide that the clerk of the court shall issue the writ of attachment upon receiving and filing an affidavit by or on behalf of the plaintiff, showing the nature of the plaintiff's claim, that same is just; the amount which the affiant believes the plaintiff is entitled to recover, and the existence of any one of the following circumstances or grounds of attachment:

> "First. In an action upon contract for the direct payment of money made or by the terms thereof payable in this State, which is not secured by mortgage, lien or pledge upon real or personal property situated or being in this State, and if so secured when such security has been rendered nugatory by the act of the defendant.
>
> "Second. In an action against a defendant not residing in this State.
>
> "Third. In an action by a resident of this State for the recovery of the value of property, where such property has been converted by a defendant without consent of the owner.
>
> "Fourth. Where a defendant has absconded, or

is about to abscond, with the intent to defraud his creditors.

"Fifth. Where a defendant conceals himself so that service of summons can not be made upon him.

"Sixth. Where a defendant is about to remove his property, or any part thereof, beyond the jurisdiction of the court, with the intent to defraud his creditors.

"Seventh. Where a defendant is about to convert his property, or any part thereof, into money, with the intent to place it beyond the reach of his creditors.

"Eighth. Where a defendant has assigned, removed, disposed of, or is about to dispose of his property, or any part thereof, with the intent to defraud his creditors.

"Ninth. Where a defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit has been commenced."

Reference to folios 129, 158, of the Record shows that the statutory provisions above referred to were utterly ignored.

No affidavit whatever was filed before the issuance of the attachment on May 12, 1893, and the only one ever filed was presented the following day for the obtention of an order of publication. The attachment was therefore void.

Furthermore, when it is desired to obtain service by publication, it is necessary that the plaintiff shall fulfill the requirements of Section 3052, providing that—

"when the person on whom the service is to be made resides out of the State, or has departed from the State, or can not, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation, or joint stock association, can not be served as provided in Section twenty-nine (3051), and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or

> proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

In the present case affidavits were filed to the effect that the defendants had departed from the State of Nevada and could not, after due diligence, be found therein, and that service of summons upon them in said action could not be made, except by the publication thereof (folios 129 and 158). It will be observed that these affidavits do not show that a cause of action existed against the defendants in respect to whom the service was to be made, and the complaints were not made part of the affidavits, although an attempt to supply the deficiencies was apparently made by the justice, who recited, in his orders permitting publication, that "from a consideration of the complaint, it appears that a cause of action exists." We respectfully submit that the action of the justice was manifestly erroneous, and that the fact should have been made to appear to his satisfaction, in accordance with the section under consideration, by affidavit. Certainly the case, in this respect, absolutely departs from statutory directions.

We need not argue the necessity of strict compliance with statutory requirements in a case of this sort, involving, as it does, the technical features pertaining to attachment suits and to service by publication.

As showing the absolute invalidity of the proceedings herein, for the reasons above pointed out, we refer to—

Roy *vs.* Whitford, 9 Nev. 370.
Little *vs.* Currie, 5 Nev. 90.
Ricketson *vs.* Richardson, 26 Cal. 149.
Braley *vs.* Seaman, 30 Cal. 610.
Forbes *vs.* Hyde, 31 Cal. 342, 354.
Victor M. & M. Co. *vs.* Justice's Court, 18 Nev. 21, 27.

Where a justice's court acts without jurisdiction, its judgment is a nullity, not voidable but void.

12 Am & Eng. Ency. Law, 400.

Consideration of the foregoing demonstrates clearly the fact that no title whatever to the Fraction Mine was conveyed to James and George Nesbitt by reason of the above recited proceedings, and, indeed, this was apparently admitted by the trial court, and also by the Supreme Court of the State of Nevada (fols. 78, 191). It was, however, contended by both courts that although the proceedings might be insufficient to confer title, the certificates of sale and deeds were nevertheless sufficient to constitute color of title, and that the Nesbitts, having color of title, were in position to file the declarations of intention before alluded to.

We contend that, in the first place, the Nesbitts had no color of title under any proper interpretation of the law when their first declaration of intention was filed. On that date, December 26, 1893, all that they possessed were the certificates of the special deputy, showing that the sales had taken place under an execution. The title had not yet ripened because of the right of the defendants in execution to redeem their property. It still rested, therefore, in De Beque and Stevens.

The certificates were insufficient as color of title for the further reason that they did not, on their face, purport to convey title. An analogous case to this is that of a certificate of purchase at a tax sale, which for the reasons above given has been repeatedly held not to constitute color of title.

Bride *vs.* Watt, 23 Ill. 455.
Dickenson *vs.* Breeden, 30 Ill. 279, 325.
McKeighan *vs.* Hopkins, 14 Neb. 361, 363, 364.

Similarly, a pre-emption certificate and claim, while possi-

bly sufficient to maintain trespass to try title, is not until perfected title or color of title.

Buford *vs.* Bostick, 58 Texas, 63, 70.

If, therefore, the Nesbitts, never having had possession or exercised any acts of ownership over the land prior to January 1, 1894, and not having had before that time color of title to the land, filed, as they did, on December 26, 1893, a certificate of intention, surely such act upon their part must have been a mere nullity. In its filing, as will appear by reference to the Record, they acted upon their own behalf and not on the behalf of Borth or anybody having any record interest in the land (folio 175).

In view of the foregoing, what importance shall we attach to the declaration of intention filed December 22, 1894 (folio 178)? None, whatever, as it seems to us. The statute was made for the benefit of the claimant or claimants of any mining location. During the year 1894 the Nesbitts were not claimants within the meaning of this act. Their supposed title was based upon the title of Stevens and De Beque, who never filed any notice of intention in 1893, or performed any labor in that year, and whose rights had therefore lapsed. The Nesbitts themselves had performed no labor in 1893, and their only excuse for considering themselves claimants was based upon their possession of a deed executed in 1894, purporting to rest upon mining rights which had already been lost.

We understand by the term "claimant" a man who has put himself in a position to make a legal, or apparently legal, claim to land; not one who, so far as the title is concerned, appears to be a mere volunteer. A mining claimant under the United States mining laws is evidently a man who has located a mining claim or who holds under someone who had made such a location. In 1894 the Nesbitts had not located any mining claim, nor did they, so far as

the Fraction Mine was concerned, succeed to the rights of anyone who had made such a location, the original locators having failed to maintain their position. The court below manifestly erred in treating the Nesbitts as mining claimants within the meaning of the statutes of Congress, and in this respect failed, as we respectfully submit, in the proper interpretation of the mining laws of the United States.

But even if the certificate of sale and the deed to the Nesbitts had constituted color of title, we must, nevertheless, earnestly insist that such title does not meet the requirements of the present case. Color of title serves to show that the person having it is claiming title, the kind of title he claims, and also to fix the boundaries of the claim, but it does not constitute title in itself. The only advantage of having color of title is in connection with some actual possession, and in this case no such possession was had in 1893, 1894 or 1895 (until the middle of December), so far as the Record discloses, by or on behalf of the supposed Nesbitt interest.

The record of the deeds to the Nesbitt brothers did not constitute notice to anybody of the existence of a title in them, for, as we have shown, the deeds were based upon certain invalid proceedings. So far as the Record discloses, when the deeds to the Nesbitts were placed of record, the title, if any, to the Fraction Mine was outstanding in De Beque, Stevens and Borth. The recordation of deeds based upon invalid sales did not change the condition of the title. There was nothing in the Nesbitts' claim upon which they could have predicated a title, or hoped to recover in any possessory action. As against Stevens and De Beque, their title could have been instantly quieted. As against the rest of the world, they did not hold possession of the land, nor had they the ability to recover it in any imaginable suit.

If, therefore, as we insist, the title to those premises was, in the fall of 1893, in Stevens, De Beque and Borth, the

question arises, did they maintain their title in conformity with the United States statutes? No one of them filed a certificate of intention.

Nesbitt claims to have filed a certificate on behalf of Borth, and Borth so testifies. Laying aside the intrinsic improbabilities of the statement of Borth (as to which we only need refer to the fact that he says his agreement, that Nesbitt should on his behalf file a declaration of intention, was made in September, 1893, two months before the Act of Congress allowing this course was passed [folio 81]), could such a certificate have been filed by Nesbitt in Borth's interest without disclosing Borth's name? We submit, not. In no possible way, even by void proceedings, was any apparent title of record vested in the Nesbitts until the deeds to them were filed, and this did not occur until September 14, 1896. True it was that on August 18,1893, the certificates of sale were placed of record, but these certificates, as we have above shown, did not convey or purport to convey title, but expressly provided that the real estate was subject to redemption within six months; and, furthermore, an examination of the proceedings upon which they were based would have disclosed the fact that the title still remained in De Beque and Stevens.

The court below predicated the rights of the Nesbitt brothers upon the consent alleged to have been given by Borth and to which we have already alluded. The opinion is expressed that—

> "The Fraction Mine being represented by one of the locaters, A. Borth, and said Nesbitt Bros. having had said notices recorded, in pursurance of said agreement and at the instance of said Borth as well as of themselves, and under the honest belief of all three that the Nesbitt Bros. had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made

> thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper Mine was made, and therefore that the location of the Sleeper Mine was and is invalid in so far as it covers the Fraction Mining Claim." (Folio 193.)

It seems to us that the foregoing presents several propositions decidedly unusual, to say the least. The first is, virtually, that the relation of tenant in common can be created as against the world by a mere act of recognition. This involves the theory that De Beque and Stevens must have lost their title because their co-tenant recognized some other man as having succeeded to it. We do not believe that title to land can be transferred in any such vague manner.

A further implication of the opinion is that the agreement between parties, of which the public has no knowledge, can take the place of record notice required by law in order to effectuate the transfer of title. It would seem to us that such an idea would defeat all necessity for the use of public records and leave the public at the absolute mercy of any claimant to any interest in the land.

But if this agreement were had, and if it had been possible to vest title by such agreement it next appears that the Nesbitts, having no title of record, undertook in 1893 to file a notice of intention to hold the fraction Mining Claim without mentioning Borth's name in any manner whatever, nor, in fact, was Borth's name mentioned in the certificate filed in 1894. In order, therefore, to sustain any title in the Nesbitts, or in Borth, we are compelled to disregard absolutely all laws calling for notice by record. There certainly was not any notice of record to show that Borth filed such a certificate, nor was there any notice of record that such certificate was filed by his consent. Surely, to leave

the gaining or the losing of a title to parol evidence of this character would be contrary to our entire public policy.

As a matter of convenience we attach to this brief copies of the Acts of Congress called in question in this case.

In view of the foregoing we respectfully submit that the judgment of the Nevada court should be reversed.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

SUPPLEMENTAL BRIEF.

This is an action brought by James Nesbitt against William Davidson, the assignor of the plaintiff in error, to determine the right of possession of certain mining ground situated in the Ferguson mining district, Lincoln County, Nevada. The defendant below claimed the ground in question under a location regularly made by himself and one James Murphy on the first day of January, 1895, which was designated as the Sleeper mine. In pursuance of this location, possession and work on the claim, Davidson entered proceedings to obtain a patent from the United States, Murphy having sold his interest to Davidson.

While these proceedings were pending James Nesbitt brought this action, claiming title in himself. The evidence disclosed the fact that neither Nesbitt nor his brother who was interested with him had ever located, taken possession of, or worked upon the claim. His sole reliance for title was based upon certain void proceedings in a justice's court and a pretended constable's sale, all of which are conceded to be void in themselves. But by the introduction of these proceedings in evidence, Nesbitt attempted to connect himself with the location of a claim made on the 15th day of May, 1892, by Wm. De Beque, H. Stevens and A. Borth, called the Fraction claim, upon which no work was done in the years 1893 and 1894, and which claim had been forfeited and the land was subject to relocation in January, 1895, when Davidson and Murphy made their location.

Notwithstanding that Nesbitt was without title or possession, he attempted to acquire title under the provisions of two Acts of Congress, which are set out in the Appendix, each of which acts authorizes a claimant of a mining claim to dispense with assessment work, provided he files a notice in good faith that he intends to hold and work his

claim. The Nesbitt brothers on the 27th day of December, 1893, filed a notice that they intended to work eight claims, giving a list of names in which was included the Fraction claim, and in the following year recorded a similar notice. The names of none of the locators of the Fraction claim appeared in either notice.

It is true there is some loose testimony tending to show that Borth, one of the locators of the Fraction claim, knew something about what the Nesbitts were doing and consented to their action, but it appears that the conversation between the Nesbitts and Borth occurred before the passage of the first Act of Congress authorizing the suspension of annual work on claims. However that may be, any secret understanding which they may have had can not affect the rights of the plaintiff in error. Borth did not convey his interest or any interest to the plaintiff below, nor did he perform any act that would confer title on said plaintiff. The district court received in evidence the pretended certificate of sale and deed of the constable on the express ground that it would give the plaintiff a colorable title and relieve him from the position of a voluntary intruder. And the Supreme Court of Nevada on appeal took the same position, and said:

> "The vital question in this case is whether the said notices the Nesbitt Bros. caused to be recorded of their intention to hold and work said mine had the legal effect of saving the mine from being subject to relocation for any period of time? In determining this question, it is not necessary to consider what legal value said certificates of sale and deeds may have, if any, except as evidence tending to show the good faith of the Nesbitt Bros. and their co-claimant, A. Borth, in all that they did with reference to said mine" (folio 191).

The court erred in supposing the question under consideration was a question of good faith. It was simply a ques-

tion of title, nothing more, nothing less, and it is immaterial whether or not the Nesbitt brothers acted in good faith, so long as they produced nothing in evidence showing a title to the claim in question.

As for the good faith of Borth in all that he did there need be no question, for he simply did nothing. There is not a particle of evidence tending to show title in the plaintiff or that Borth ever did anything to preserve the title he acquired to the Fraction claim in 1892; on the contrary, the evidence shows that so far as he was concerned he abandoned the claim. Notwithstanding this, judgment was rendered for Nesbitt. Upon what ground the court below entered a judgment for Nesbitt, which the Supreme Court of Nevada sustained, it is difficult to imagine. The attempt was made to acquire title under the Acts of Congress suspending work on mining claims through the notices of the Nesbitts that they intended to work the Fraction claim. Such a construction of the Acts of Congress is certainly erroneous, because the Nesbitts by those notices could perpetuate no claim which they did not have. They were not claimants within the meaning of the statutes. Even if they did save the claim from relocation and perpetuate the title in the locators of the Fraction claim, it would not alter the case because nobody except an adverse claimant to the land, or the United States, could question the location and possession of the Sleeper claim by the plaintiff in error and its grantors. The locators of the Fraction claim did not protest but remained silent, and under section 2325 of the Revised Statutes of the United States their claim was barred.

Nesbitt was not an adverse claimant with a better title or any title to the ground in question, and judgment should have been rendered against him.

Whatever claim the defendant in error may have to the mine in question, according to the position of the court below, grows out of the construction of the two Acts of

Congress of November 3, 1893, and July 18, 1894, and consequently a Federal question is presented conferring jurisdiction upon this honorable court.

Miller *vs.* Nicholls, 4 Wheaton, 311.
Railroad Co. *vs.* Maryland, 20 Wallace, 643.
State of Minnesota *vs.* Bachelder, 1 Wallace, 109.
Kaukauna Water Power Co. *vs.* Green Bay & Miss. Canal Co. 142 U. S. 254.

WILLIAM M. STEWART,
JACKSON H. RALSTON,
Attorneys for Plaintiff in Error.

APPENDIX.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims. (28 Stats. at L. 6.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage.

Approved Nov. 3, 1893.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims. (28 Stats. at L. 114.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

Approved July 18, 1894.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY, Plaintiff in Error,

vs.

JAMES NESBITT, Defendant in Error.

MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

James Nesbitt, the defendant in error, moves the Court to dismiss the writ of error herein for the want of jurisdiction in this Court, because the plaintiff in error brings itself within none of the provisions of Section 709 of the Revised Statutes of the United States.

In support of this motion the defendant in error shows that this is a case brought to this Court by writ of error to the Supreme Court of Nevada to reverse a decree rendered by that Court in favor of the defendant in error sustaining the trial court and against the plaintiff in error.

Defendant in error submits that the writ of error herein should be dismissed because the decision of the State court was based upon the statutes of the State relating to its own system of jurisprudence and general jurisprudence and will not be reviewed by this Court; and because the plaintiff in error claimed no rights under acts of Congress of November 3, 1893, and July 18, 1894; and be-

sides, the validity of the statutes was upheld, and further, because it was not intended to give this Court the power to revise the decision of a State court in a controversy between two of her own citizens claiming under the same act of Congress.

In support of this motion and a part thereof, the defendant in error submits a brief setting forth a statement of the case and the points involved, both of law and fact, with a reference to the page of the record and the authorities bearing thereon.

WALTER A. JOHNSTON,

Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY, Plaintiff in Error,

vs.

JAMES NESBITT, Defendant in Error.

ON MOTION TO DISMISS WRIT OF ERROR.

DEFENDANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error, upon a protest and adverse claim, against one William Davidson as an applicant for a patent from the Government of the United States, to certain mining ground designated and described as the "Sleeper" mine and mining claim, which is claimed to have been located on the 1st day of January, A. D. 1895.

The defendant in error bases his protest and adverse claim upon the "Fraction" mine and mining claim, which was located on the 15th day of May, A. D. 1892, by A. Borth, one of his present co-owners, and Stevens and De Beam, whose interests he and his other co-owner, George Nesbitt, have acquired by purchase at judicial sales under the laws of the State.

Pending the trial of the case, and prior to his transfer to the present plaintiff in error, the said Davidson made and verified an amended or supplemental answer, and asked leave to file the same, which was denied, in which he claimed title to the ground in dispute by virtue of a new location, made pending the trial, and in which he denied the validity of the "Sleeper" location, upon which he had applied for a patent. This answer, although not permitted to be filed, was introduced in evidence by the defendant in error. (Record, p. 9.)

On trial in the State District Court a judgment was rendered for plaintiff—defendant in error. On appeal to the State Supreme Court, this judgment was affirmed, and a petition for a rehearing denied, and a petition for a writ of error denied by the Chief Justice of the State Supreme Court. (Record, p. 89.)

ARGUMENT.

This court has no jurisdiction, and the writ of error should be dismissed.

The plaintiff in error brings itself within none of the provisions of Sec. 709 of the Revised Statutes of the United States. (1.) The validity of no treaty, nor statute of the United States, nor any authority exercised under the United States, was drawn in question in the State Courts.

(2.) The validity of no statute of, nor authority exercised under the State of Nevada, on account of their being repugnant to the Constitution, treaties, or laws of the United States, was drawn in question in said State Courts.

(3.) *a.* The only title, right, privilege, or immunity set up or claimed by the plaintiff in error or its grantor, William Davidson, was the right to purchase certain mineral ground from the Government of the United States under the general mining laws thereof; and the said Davidson,

by his verified answer which he sought to file, as hereinbefore stated, denies that he had such right. Whatever right he had, however, depended upon *evidence alone* and not upon the construction of any statute, and this court will not examine the evidence on a writ of error.

Mrs. Lillian W. Egan and husband, plaintiffs in error, *vs.* A. Hart, H. B. Richardson, and F. M. Kerr, decided in this court February 1, 1897.

165 U. S., 188, and cases cited, and also Williams *vs.* Norris, 12 Wheat., 116.

b. The only statute of the United States, the construction of which was brought to the attention of the State courts, was the Act of Congress of July 18, 1894.

U. S. Statutes at Large, 1893–94, p. 114.

The plaintiff in error claimed no rights under this statute, and besides the validity of the statute was upheld by the State Court.

(4.) The decision of the State Court was based entirely upon the statutes of the State relating to its own system of jurisprudence and general rules of jurisprudence, and, therefore, will not be reviewed by this court.

See

Decisions of the Supreme Court of the State. (Record, p. 84.)

And

W. P. Sayward, plaintiff in error, *vs.* Arthur A. Denny *et al.*, executors. Decided in this court May 6, 1895, 158 U. S., 180.

It is, therefore, respectfully submitted that the writ of error in this case should be dismissed at the cost of the plaintiff in error.

WALTER A. JOHNSTON,

Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
Plaintiff in Error,

vs.

JAMES NESBITT, Defendant in Error.

DEFENDANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error in the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln upon a protest and adverse claim against the application of one William M. Davidson for a patent from the Government of the United States, to certain mining ground, designated and described as the "Sleeper" mine and mining claim, which is claimed to have been located on the first day of January, A. D. 1895.

The defendant in error bases his protest and adverse claim upon the "Fraction" mine and mining claim, which was located on or about the 15th day of May, A. D. 1892, by A. Borth, one of his present co-owners, and W. L. De Beque and H. Stevens, whose interests he and his other co-owner, George Nesbitt, have acquired by purchase at judicial sale in actions brought against them by the said defendant in error and said George Nesbitt (Record, pp. 66 and 77).

Pending the trial of the case and prior to his transfer to the plaintiff in error, the said William M. Davidson asked leave to file an amended answer, duly verified by himself, in which he claimed title to the ground in dispute by virtue of a new location, made pending the trial, and denied the validity of the Sleeper location, upon which he had originally applied for a patent (R., p. 9).

On trial in the State District Court, a judgment and decree was rendered for plaintiff—the defendant in error. On appeal to the State Supreme Court, this judgment and decree was affirmed and a petition for a rehearing denied (R., pp. 84–89).

Whereupon plaintiff in error presented its petition for a writ of error to the Hon. Joseph McKenna, a Justice of this Court, which appears in the printed record (R., p. 93), but there are no assignment of errors in the Record, except such as are embraced in the petition for the writ.

I.

Argument.

We submit that the writ of error should be dismissed for the following reasons:

First: There are no assignment of errors as required by Sec. 997 of the Revised Statutes and Rule 35 of this Court; the petition for the writ not being a part of the record, although it appears among the papers which constitute the record. See Warfield *vs.* Chaffe, 91 U. S., 690.

Second: (1) The validity of no law of the United States was drawn in question in the Courts of the State of Nevada in this case, and the counsel for plaintiff in error only claim that the final decision of this Court "fairly and clearly depends upon the proper *construction* to be given to said Special Acts of 1893 and 1894, etc." We quote as a matter of argument from the petition for the writ of error, which appears

in the printed record at page 96. That part of Sec. 25 of the Judiciary Act of 1789 (1 Stat., 25) which gave to this Court appellate jurisdiction in cases decided in the highest court of a State, "when is drawn in question the *construction* of any clause of the Constitution or of a treaty or Statute" of the United States, was repealed by Sec. 2 of the Act of 1867 (14 Stat., 385).

The plaintiff in error did not claim any rights under the Acts of 1894 and 1893, and consequently none could be denied it. Section 2 of the Act of 1867 is the same as Sec. 709 of the Revised Statutes.

The only right, title, privilege, or immunity set up or claimed by the plaintiff in error or its grantor, William M. Davidson, was the right to purchase certain mineral grounds from the Government of the United States. This right depended entirely on evidence alone, and this Court will not examine the evidence on a writ of error.

See Mrs. Lillian W. Egan and husband, plaintiff in error, *vs.* A. Hart, H. B. Richardson, and F. M. Kerr, defendants in error, 165 Vol. U. S. Sup. Court R., p. 188 and cases cited.

If this Court could review the evidence it would certainly feel itself bound to find that the plaintiff in error had no right to the patent applied for by Davidson, the original defendant, when he, by a solemn judicial admission, under oath, and before he had transferred his rights to the plaintiff in error, admitted that he had no right to the patent at the time he applied for it. See his amended answer (R., p. 9).

Third: The decision of the State court was based entirely upon the Statutes and rules of general jurisprudence of the State, and for that reason will not be reviewed by this Court.

See opinions of Court (R., pp. 84–89) and W. P. Sayward, plaintiff in error, *vs.* Arthur A. Denny *et. al.*, executors, defendants in error, 158 U. S. Sup. Court R., p. 180; Quinby *vs.* Boyd, 128 U. S., 502.

II.

On the Merits.

First: All the proceedings in the cases of Nesbitt *vs.* Stevens and De Beque (R. from p. 58 to p. 84) were valid.

(1) The objection that the summons was made returnable more than ten days from its issuance is answered by the Statute (General Statutes of Nevada, Sec. 3539), which reads as follows:

"Second: When the defendant is a non-resident of the township or city, or when the plaintiff is a non-resident, it shall be returnable not more than two days from its date, and shall be served at least one day before the time for appearance, except in cases when it is to be served by publication, or out of the State, or by posting notices thereof, when it shall be made returnable at any time designated by the justice, not less than six weeks nor more than four months from its issuance."

See also, Coffin *vs.* Bell, 22 Nev., 169.

(2) The affidavits and orders for the publication of summons were sufficient.

See Statutes of Nevada, 1889, page 22, which reads as follows:

"When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation or joint stock association, cannot be served as provided in section twenty-nine, and the fact shall appear by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons." See also:

Woodward *vs.* Brown, 51 Pac. Rep., p. 7.

And even if they are not sufficient as between the parties

in the same suit their deficiency cannot be inquired into in this action by entire strangers to the proceedings.

Penoyer *vs.* Neff, 95 U. S., 721.
Sharp *vs.* Daugney, 33 Cal., 506.
Hahn *vs.* Kelly & Morse, 34 Cal., 391.
Quivey *vs.* Kennedy, 37 Cal., 458.
Reeve *vs.* Kennedy, 43 Cal., 643.
People *vs.* Mullan, 65 Cal., 395.
12 Amer. and Eng. Ency Law, 148 J. and note.

(3) The justice court obtained jurisdiction of the subject-matter of the action by the attachment of the mines, and the presumption is that the subsequent proceedings were regular.

Second: The counsel for plaintiff in error admitted in their brief and argument before the Supreme Court of the State of Nevada that an attachment levied on a mining claim would be such a right and interest as could be protected from forfeiture by the attaching creditors' doing the annual work, and that is this case, if no judgments had been rendered; but the certificate of sale (R., pp. 65 and 75) gave an equitable color of title, and the deeds (R., pp. 66 and 77) gave color of title which could ripen into title, which could be protected as against strangers.

Tryon *vs.* Huntoon, 67 Cal., 325.
Field *vs.* Columbet, 4 Sawyer, 52.
Hall *vs.* Law, 102 U. S., 466.

Third: That the defendant in error, and his co-owner, George Nesbitt, claimed title in good faith from the time the interests of De Beque and Stevens was sold to them is not disputed; and that Borth recognized them as his co-tenants from the time of the sale is equally undisputed. Thus, they were all "claimants" within the meaning of the Act of Congress of July 18, 1894 (Statutes of 1893–4, p. 114), which was a copy of the Act of November 3, 1893.

Morrison's M. Rights, 87.
Lindley on Mines, Sec. 633.

Fourth: The notices of their intention to claim and work the mine, filed in 1893 and 1894, were sufficient (R., pp. 79 and 80). See Statutes cited *supra*.

15 Morrison's M. Reports, 335.

Borth, for whom this action was prosecuted, as well as for the defendant in error and George Nesbitt (R., p. 1), was an original locator of the "Fraction" mining claim (Notice of Location, R., p. 83) and has always done and performed everything required by law, to preserve and protect his rights. He caused the notices of intention to claim and hold the mine under the Statutes of 1893–4, *supra*, to be recorded, and performed his share of the work, always in connection with the Nesbitts, whom he recognized as his co-owners, and kept the "Fraction" mining claim intact. His interest was certainly never forfeited, and consequently the "Fraction" mining claim was never forfeited. (See his testimony on recall, R., p. 37, *et seq.*)

All presumptions are against forfeitures. To establish a forfeiture the law must be beyond cavil, and the evidence beyond doubt.

Lindley on Mines, Sec. 645 and notes.

Fifth: We respectfully call the particular attention of the Court to the opinion of the Supreme Court of the State of Nevada in response to the petition of plaintiff in error for a rehearing in that Court (R., p. 89), which is a complete answer to all of the contentions of the plaintiff in error in this Court.

We, therefore, respectfully submit that the writ of error should be dismissed or that the judgment of the Supreme Court of the State of Nevada should be affirmed.

WALTER A. JOHNSTON,
Attorney for Defendant in Error.

GEORGE S. SAWYER,
Of Counsel.

Statement of the Case.

Where the plaintiff based his right to recover upon an act of Congress suspending the forfeiture of mining claims for failure to do the required amount of work, and the decision of the court was in favor of the right claimed by him under this statute, the defendant is not entitled to a writ of error from this court to review such finding.

THIS was a suit begun in the District Court for the Fourth Judicial District of Nevada by Nesbitt as part owner of the Fraction mine, against one William Davidson, the alleged locator of the Sleeper mining claim, covering the same ground as the Fraction mine, to quiet plaintiff's title and that of his co-tenants to the Fraction mine, and to recover a money judgment against the defendant.

The complaint alleged that the plaintiff and his coöwners were tenants in common, and since May 15, 1892, had been in possession of the Fraction mining claim, pursuant to the laws of the United States, and that the defendant also claimed a right to possession upon the alleged location of a certain mining claim called by him the Sleeper mine; that such location was made subsequent to the location of the Fraction mine, and that the plaintiff had protested in the land office at Carson City against the issuance of a patent to the defendant.

The answer denied the ownership and possession of the plaintiff of the Fraction mine, and alleged as a defence the invalidity of the proceedings under which Nesbitt and his co-tenants had acquired the titles of the original locators to the Fraction mine.

The case came on for trial before the court without a jury, and resulted in a judgment for the plaintiff, whereby it was decreed that the title of plaintiff and his co-tenants to the Fraction mine be quieted, and the claim of the defendant to that portion of the Sleeper mine embraced within the boundary lines of the Fraction mine, be rejected; with a further decree for the recovery of certain incidental fees and costs. Upon motion for a new trial, it was ordered that De Lamar's Nevada Gold Mining Company be substituted as defendant in the place of Davidson, deceased, and that the motion for a new trial be overruled. Defendant appealed to the Supreme Court of the State, which affirmed the judgment. 52 Pac. Rep. 609. Whereupon it sued out a writ of error from this court.

Mr. Jackson H. Ralston and *Mr. William M. Stewart* for plaintiff in error.

Mr. Walter A. Johnston and *Mr. George S. Sawyer* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Defendant, known as De Lamar's Nevada Gold Mining Company, (hereinafter referred to as the mining company,) claims title to the property in question through an application filed by Davidson in the land office at Carson City, in pursuance of Rev. Stat. § 2325, for a patent to the Sleeper mine, against the issue which patent plaintiff Nesbitt filed an adverse claim as to so much of the Sleeper mine as was embraced within the boundaries of the Fraction mine.

Plaintiff Nesbitt took title to the Fraction mine through a location made May 12, 1892, by W. De Beque, H. Stevens and A. Borth, who, it appeared, performed all the acts required to make a valid location. Plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title and interest of De Beque and Stevens to this mine through certain judgments recovered in a justice's court against De Beque and Stevens, upon which executions had been issued, and a sale made to the Nesbitt brothers of their interests in the Fraction mine. This left the Nesbitts and Borth the owners of that mine as tenants in common. The court held these judgments to be void, but admissible for the purpose of showing or tending to show color of title and adverse possession in the Nesbitts and Borth. It further appeared that the Nesbitts and Borth did assessment work in each of the years 1895, 1896 and 1897 to the full amount required by law, (§ 2324;) that no work was done in either of the years 1893 and 1894, but that the Nesbitt brothers, in December of each of said years, had a notice recorded in the county recorder's office, where the original notice of the location of the Fraction mine was filed, declaring their intention in good faith to hold and work the mine. Meantime, however, the Sleeper mine was located January 1, 1895, the boundaries of which took in the Fraction mine.

The Supreme Court held the vital question to be whether the notices which the Nesbitt brothers caused to be recorded of their intention to hold and work the mine had the legal effect of saving it from being subject to a relocation by Davidson. Revised Statutes, § 2324, provides that until a patent has been issued upon a mining claim previously located, "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year," and that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." But, owing probably to the stress of the financial panic then prevailing, Congress passed on November 3, 1893, an act, 28 Stat. 6, c. 12, providing that the requirements of section 2324 be suspended for that year, "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for the non-performance of the annual assessment for the year 1893," provided a notice of an intention to hold and work the claim be filed in the proper office. This act was extended to the year 1894 by a subsequent statute. Act of July 18, 1894, c. 142, 28 Stat. 114. Plaintiff relied upon these statutes, and the court held that, the Nesbitt brothers and Borth having had the notice required by the statutes recorded, under an agreement between themselves recognizing each other as coöwners and tenants in common, and under the honest belief of all three that the Nesbitt brothers had legally acquired all the interest of De Beque and Stevens by virtue of the sale made under these judgments, the mine had not been forfeited, and was not subject to relocation when the location of the Sleeper mine was made, and therefore that the location of such mine was invalid, so far as it covered the Fraction mining claim.

From this summary of the pleadings and findings of the court, it is clear that the defendant set up no right, title, privilege or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made by Davidson under the general mining laws of the United States,

Rev. Stat. § 2325, was not in itself sufficient to raise a Federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court something more must appear than that the parties claim title under an act of Congress.

The subject is fully discussed and the prior authorities cited in the recent case of *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, which was also a contest between rival claimants of a mine under sections 2325 and 2326. It was held that the provision in section 2326 for the trial of adverse claims to a mining patent "by a court of competent jurisdiction," did not in itself vest jurisdiction in the Federal courts, although, of course, jurisdiction would be sustained, if the requirements of amount and diverse citizenship existed; and that the judgment of the Supreme Court of the State in such case could not be reviewed in this court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the still later case of *Florida Central & Peninsular Railroad* v. *Bell*, 176 U. S. 321. See also *California Powder Works* v. *Davis*, 151 U. S. 389.

If the law were otherwise, then every land case wherein one of the parties claimed title, either immediately or remotely through a patent of the United States, would present a Federal question; and as most of the land titles in the Western States of this country are traceable back to a right under the laws of the United States, every such case might be held reviewable by this court on writ of error. This position, of course, is untenable. If the fact that the plaintiff takes title directly or indirectly from the United States be insufficient to create a case "arising under the Constitution or laws of the United States" within the meaning of the jurisdictional act of 1888, much less does it make one of a "title, right, privilege or immunity" claimed under a statute of the United States, an adverse decision of which by the highest court of a State entitles the injured party under Rev. Stat. sec. 709 to a writ of error from this court. To raise a Federal question the right must be one claimed

under a particular statute of the United States, the validity, construction or applicability of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error. No Federal question was presented by the pleadings in the case, and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which the Nesbitt brothers had acquired the interest of De Beque and Stevens in the Fraction mine.

There was undoubtedly a Federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of, and not against, the right claimed under the statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of *Missouri* v. *Andriano*, 138 U. S. 496, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat. sec. 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held that the *relator* had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of *his* right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review, where the right or privilege was asserted by the other party, and the decision was in favor of that party and adverse to himself. It is manifest that the object of section 709 was not to give a right of review wherever the validity of an act of

Syllabus.

Congress was drawn in question, but to prevent States from frittering away the authority of the Federal government by limiting too closely the construction of Federal statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed. To the same effect are *Dower* v. *Richards*, 151 U. S. 658, 666; *Sayward* v. *Denny*, 158 U. S. 180; *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288; *Rae* v. *Homestead Loan & Guaranty Co.*, 176 U. S. 121; *Abbott* v. *Tacoma Bank*, 175 U. S. 409.

Except so far as the case under consideration required a construction of the above-mentioned acts of Congress suspending the forfeiture of mining claims, the questions were purely of a local nature, and not subject to review in this court.

There is no Federal question presented by the record in this case, and it must therefore be

Dismissed.

MR. JUSTICE MCKENNA dissented.

DE LAMAR'S NEVADA GOLD MINING COMPANY *v.* NESBITT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 152. Argued March 1, 1900. — Decided April 30, 1900.

The fact that in a state court plaintiff and defendant make adverse claims to a mining location under the mining laws of the United States (Rev. Stat. § 2325), does not of itself present a federal question within the meaning of Rev. Stat. § 709.

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